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In The

Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Administrative Procedure Act allows an aggrieved party to seek judicial review of "final agency action" under the deferential "arbitrary and capricious" review standard. 5 U.S.C. § 706(2). In certain situations where the agency has failed to act, the Act also allows a claimant to bring suit to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The question presented is:

Whether a claimant may avoid the deferential "arbitrary and capricious" standard of review when challenging ongoing and discretion-laden agency action by styling his complaint as an action under section 706(1) to "compel" agency action.

PARTIES TO TENTH CIRCUIT PROCEEDINGS

The following parties were Plaintiffs in the District Court, Appellants in the Tenth Circuit, and are Respondents before this Court:

1. Southern Utah Wilderness Alliance;
2. The Wilderness Society;
3. Sierra Club;
4. Great Old Broads for Wilderness;
5. Wildlands CPR;
6. Utah Council of Trout Unlimited;
7. American Lands Alliance; and
8. Friends of the Abajos.

The following parties were Defendants in the District Court, Appellees in the Tenth Circuit, and are Respondents before this Court:

1. Gale Norton, Secretary, United States Department of the Interior;
2. Kathleen Clarke, Director, Bureau of Land Management; and
3. Bureau of Land Management.

The following parties were Defendant-Intervenors in the District Court, Appellees in the Tenth Circuit, and are Petitioners before this Court:

1. Utah Shared Access Alliance;
2. BlueRibbon Coalition;

PARTIES TO TENTH CIRCUIT PROCEEDINGS – Continued

3. Elite Motorcycle Tours; and
4. Anthony Chatterly.

Pursuant to Supreme Court Rule 29.6, Petitioners Utah Shared Access Alliance, BlueRibbon Coalition and Elite Motorcycle Tours hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Petitioners.

The following parties were Defendant-Intervenors in the District Court, Appellees in the Tenth Circuit, and are Respondents before this Court:

1. State of Utah;
2. San Juan County, Utah;
3. Emery County, Utah;
4. Kane County, Utah;
5. Wayne County, Utah; and
6. Utah School and Institutional Trust Lands Administration.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to Tenth Circuit Proceedings	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Federal Statutes and Rules Involved	2
Statement of the Case	2
A. The Statutory and Regulatory Framework	4
B. Federal District Court Proceedings	8
C. The Tenth Circuit Ruling	12
Reasons for Granting the Petition	15
A. The Tenth Circuit's Decision Conflicts with Decisions of Two Other Courts of Appeals	16
B. This Court Has Never Scrutinized APA Section 706(1) Jurisdictional Analysis	22
C. The Tenth Circuit's Analysis Creates Confusion within Federal Courts and Subjects Administrative Agencies to Unintended and Unmanageable Judicial Oversight	24
Conclusion	26

Appendix:

Tenth Circuit opinion (Aug. 29, 2002).....App. 1 at p. 1

District Court opinion (Dec. 22, 2000).....App. 2 at p. 56

Tenth Circuit decision denying petitions for rehearing (Feb. 18, 2003).....App. 3 at p. 78

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barnhart v. Peabody Coal Co., 123 S.Ct. 748 (2003).....22

Bennett v. Spear, 520 U.S. 154 (1997).....4, 19

Brock v. Pierce County, 476 U.S. 253 (1986).....22

Center for Biological Diversity v. Abraham, 218 F.Supp.2d 1143 (N.D.Cal. 2002).....25

Coit Independence Joint Venture v. Federal Savings and Loan Insurance, 489 U.S. 561 (1989).....22

Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980).....22

Ecology Center v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999).....5, 17, 18, 19, 25

Japan Whaling Assoc. v. American Cetacean Society, 478 U.S. 221 (1986).....22

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).....4, 14, 23

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)..... 8

Montana Wilderness Assoc. v. U.S. Forest Service, 314 F.3d 1146 (9th Cir. 2003).....25

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)..... 4

Mount Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).....23

National Wildlife Foundation v. Caldera, 2002 WL 628649 (D.D.C. 2002).....25

Nevada v. Watkins, 939 F.2d 710 (9th Cir. 1991)..... 5

TABLE OF AUTHORITIES – Continued

Page

ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998) ..... *passim*

Public Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21 (D.C.Cir. 1984) 5

Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982) 5

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) ..... *passim*

Sierra Club v. Thomas, 828 F.2d 783 (D.C.Cir. 1987) 23

FEDERAL STATUTES

5 U.S.C. §§ 702, 704 4

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) 4

16 U.S.C. § 1281(a) 24

16 U.S.C. § 1534(a) 24

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

42 U.S.C. § 4332(2)(C) 8

43 U.S.C. § 1712 17

43 U.S.C. § 1732 17

43 U.S.C. § 1782(a) 5

43 U.S.C. § 1782(c) 6

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS

40 C.F.R. § 1502.9(c)(1) 8, 14
40 C.F.R. § 1601.0-5 16
43 C.F.R. § 8240.0-7 19
43 C.F.R. part 8340 7
43 C.F.R. § 8340.0-5 3
43 C.F.R. § 8341.1 7
43 C.F.R. § 8341.2(a) 7
43 C.F.R. § 8342.1(a)-(c) 7
43 C.F.R. § 8342.2 7
43 C.F.R. § 8364.1 7
44 Fed.Reg. 72014 (1979) 6
48 Fed.Reg. 31854 (1983) 6

OTHER AUTHORITIES

Fed.R.Civ.P. 12(b)(1) 2
Fed.R.Civ.P. 12(h)(3) 2
Fed.R.Civ.P. 54(b) 11
Supreme Court Rule 29.6 iii

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding. The opinion was filed on August 29, 2002, and judgment was entered on February 26, 2003.

OPINIONS BELOW

The opinion of the Tenth Circuit, entered on August 29, 2002, is published at 301 F.3d 1217, and is reprinted in the Appendix hereto, App. 1, p. 1, *infra*.

The opinion of the United States District Court for the District of Utah, filed on December 22, 2000, is available at 2000 WL 33347722, and is reprinted in the Appendix hereto, App. 2, p. 56, *infra*.

On February 18, 2003, the Tenth Circuit issued an unpublished order denying petitions for rehearing and remanding this case to the District Court. That order is reprinted in the Appendix hereto, App. 3, p. 78, *infra*.

JURISDICTION

The opinion of the Tenth Circuit was filed on August 29, 2002. A petition for rehearing was timely filed by the Petitioners on October 9, 2002. After receiving an extension of time, Respondents Gale Norton, et al., filed a petition for rehearing on November 26, 2002. Both petitions for rehearing were denied in an unpublished order from the Tenth Circuit dated February 18, 2003. The

judgment of the Tenth Circuit was issued on February 26, 2003. The 90-day period for filing this Petition for Certiorari expires on May 19, 2003. This Petition was in fact filed on or before that May 19 date.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND RULES INVOLVED

Section 706(1) of the Administrative Procedure Act provides, in relevant part, that

> The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed. . . . "

5 U.S.C. § 706(1).

Rule 12 of the Federal Rules of Civil Procedure provides that a defendant may assert, "by motion," the defense of "(1) lack of jurisdiction over the subject matter. . . . " Fed.R.Civ.P. 12(b)(1). Rule 12 further provides "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

STATEMENT OF THE CASE

On October 27, 1999, Plaintiffs-Respondents Southern Utah Wilderness Alliance, et al. ("SUWA") filed a complaint in the United States District Court for the District

of Utah against the Secretary of the Department of Interior, the Bureau of Land Management ("BLM") and the Director of BLM, alleging that BLM had "'failed to perform its statutory and regulatory duties' by not preventing harmful environmental effects associated with [off-highway vehicle[1]] use" on BLM-managed federal lands. App. at 5. The complaint was based on federal question jurisdiction. 28 U.S.C. § 1331.

The complaint advanced ten (10) separate claims for relief, all seeking judicial review solely under section 10(e)(A) of the Administrative Procedure Act (the "APA"), codified at 5 U.S.C. § 706(1) ("APA section 706(1)"). App. at 5. According to SUWA's theory, BLM was failing to take action in complete conformance with the Federal Land Policy and Management Act ("FLPMA") to prevent OHV "impairment" of Wilderness Study Areas, was failing to take sufficient action to implement certain provisions of applicable land management plans, and was failing to supplement certain environmental analyses regarding OHV use. *Ibid.* SUWA acknowledged that BLM had taken actions to address OHV management in the areas at issue, but characterized these efforts as "half steps" upon the applicable legal duties. See App. at 67. SUWA therefore sought to "compel" BLM management action they believed to be "unlawfully withheld or unreasonably delayed."

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[1] The terms "off highway vehicle" ("OHV") and "off road vehicle" ("ORV") are often used interchangeably and typically refer to motorized vehicles ranging from full size pickups, sport utility vehicles and jeeps to all-terrain vehicles to motorcycles, all "capable of, or designed for, travel on or immediately over land . . . or other natural terrain. . . . " 43 C.F.R. § 8340.0-5.

A. The Statutory and Regulatory Framework

Several layers of statutes and regulations provide the applicable legal framework underlying this dispute. The substantive duties in question arise from statutes like FLPMA. These duties are further refined through administrative regulations promulgated in accordance with these statutes. However, none of the statutes at issue in this case provide for an independent right to review, so judicial review proceeds under the APA. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990).

1. The APA allows for judicial review of agency action, as well as an agency's failure to act. The starting point in this jurisdictional analysis is whether the agency has taken "final agency action." See *Lujan*, 497 U.S. at 882-883 (analyzing APA provisions at 5 U.S.C. §§ 702, 704 limiting judicial review to "final agency action" presented by a party "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . "). "Final agency action" occurs when the action "mark[s] the 'consummation' of the agency's decisionmaking process" and when the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'. . . . " *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Where a claimant properly challenges final agency action, the reviewing court will analyze the claim under the "arbitrary and capricious" review standard. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The APA also authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This cause of action prevents the

agency from avoiding review entirely by failing to do anything, for "[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to carry out its substantive statutory mandates." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C.Cir. 1984). Courts have referred to this cause of action as "an exception to the final agency action requirement." *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1137 (9th Cir. 1998). However, courts have generally found that to properly invoke APA section 706(1) the relevant duty must "provide[ ] a clear statutory duty with which a court can require [the agency] to comply." *Id.* at 1139. Assuming the presence of such a duty, the claimant must identify "a genuine failure to act" as opposed to "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)); see also *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

2. Congress enacted FLPMA in 1976 to create a "'versatile framework' for governing the BLM's management of public lands." App. at 7 (quoting *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737-738 (10th Cir. 1982)). Among the many issues FLPMA addressed was the identification and management of "public lands" possessing "wilderness characteristics." App. at 7; 43 U.S.C. § 1782(a). Areas identified by BLM as possessing "wilderness characteristics" were identified as "Wilderness Study Areas" or "WSAs." App. at 8. In Utah, the BLM has deemed approximately 2.5 million acres of land to be under WSA

status. App. at 8 n.3. The Secretary of Interior has recommended that approximately 1.9 million acres of WSA lands be formally designated as wilderness, but Congress has not acted on this recommendation. App. at 63. Pending a Congressional action to "affirmatively designate[ ] or expressly reject[ ] a particular WSA for wilderness preservation" FLPMA directs that WSAs be managed "so as not to impair the suitability of such area for preservation as wilderness." 43 U.S.C. § 1782(c).

In addition to lands receiving WSA status, FLPMA outlines an inventory process to be conducted by BLM to identify lands containing "wilderness qualities" so that BLM may conduct further study "to determine whether to give them WSA status." App. at 71-72. These areas are commonly referred to as "Section 202 areas." *Ibid.*

3. To implement FLPMA's WSA "nonimpairment" mandate "BLM promulgated the Interim Management Policy and Guidelines for Lands Under Wilderness Review, known as the 'IMP.'" App. at 64; 44 Fed.Reg. 72014 (1979); 48 Fed.Reg. 31854 (1983) (amendments). The IMP states "the nonimpairment standard does not mean that the lands will be managed as though they had already been designated as wilderness." App. at 10 n.4. However, BLM must ensure "the existing values of *all* WSAs . . . are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress' prerogative to either designate a WSA as wilderness or release it for other uses." *Id.* at 64 (italics added by District Court). The IMP provides that OHV travel "may only be allowed on existing ways and within 'open' areas that were designated prior to the passage of FLPMA." *Id.* at 65. Vehicle travel can also be designated in sand dunes. *Ibid.* The IMP directs the agency to "take all actions necessary

to ensure full compliance with the IMP" but also indicates the agency can "make 'every effort . . . to obtain voluntary compliance,' but also to take "additional appropriate action" in the event voluntary efforts fail." *Ibid.* The IMP also provides that BLM should "attempt to immediately reclaim the impacts caused by any authorized action" and can "adjust the time, location, or quantity of use or prohibit that use in [an] impacted area." *Ibid.* The District Court summarized the IMP by observing "while there is a 'nonimpairment' mandate, there are management options and levels of response that can be taken to deal with impairment problems. . . . " *Ibid.*

Section 202 area management is not governed by the IMP, but falls under the implementing regulations addressing BLM lands in general. OHV management is addressed at 43 C.F.R. part 8340. These regulations provide, in part, that BLM will conduct a process to designate "areas and trails" open to OHV use. 43 C.F.R. § 8341.1. Designation shall occur through the "resource management planning process" including public notice and involvement. 43 C.F.R. § 8342.2. Designations are to be based on several criteria, including minimization of damage to "soil, watershed, vegetation, air, or other resources of the public lands," minimization of harassment of wildlife, and minimization of "conflicts" between OHV and other uses of public lands. 43 C.F.R. § 8342.1(a)-(c). If BLM determines "that off road vehicles are causing or will cause considerable adverse effects" upon resources, then the agency may immediately close the area(s) in question "the to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence." 43 C.F.R. § 8341.2(a); see also 43 C.F.R. § 8364.1 (describing broader authority to

issue closure and restriction orders addressing any uses or activities "to protect persons, property, and public lands and resources").

4. SUWA also brought claims under the National Environmental Policy Act ("NEPA") alleging BLM had failed to properly consider whether to supplement its analysis of OHV management. NEPA requires federal agencies to analyze the "environmental impact" of "major Federal actions significantly affecting the quality of the human environment. . . . " 42 U.S.C. § 4332(2)(C). However, this Court has noted "[t]he subject of post-decision supplemental environmental impact statements is not expressly addressed in NEPA." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370 (1989). Rather, an agency's duties to supplement a prior NEPA analysis are outlined in the NEPA's implementing regulations promulgated by the Council on Environmental Quality. *Id.* at 372. Those regulations indicate an agency "shall" prepare a supplemental analysis if "the agency" makes "substantial changes in the proposed action that are relevant to environmental concerns" or if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). An agency need not supplement analyses of projects already completed, for the duty to supplement arises when "there remains 'major Federal action[n]' to occur. . . . " *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)) (bracketing in *Marsh*).

B. Federal District Court Proceedings

SUWA filed its complaint on October 27, 1999. App. at 5. The Petitioners successfully moved to intervene. *Ibid.*

After amending their complaint, SUWA moved for a preliminary injunction. *Ibid.* For scheduling reasons, the District Court initially treated SUWA's motion as an application for a temporary restraining order and conducted a two-day evidentiary hearing on that application, which was denied, and later conducted a four-day evidentiary hearing on the motion for preliminary injunction. App. at 57 (explaining preliminary injunction hearing was held August 28-31, 2000); 66 (explaining District Court received testimony "during a two-day hearing on Plaintiffs' motion for temporary restraining order and during a four-day preliminary injunction hearing . . . "). In responding to the motion for preliminary injunction, Petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), asserting the District Court lacked subject matter jurisdiction to hear SUWA's claims. App. at 59. The District Court accepted further briefing and conducted an additional argument on the pending motions on December 13, 2000. *Id.* at 57.

SUWA's preliminary injunction focused on BLM OHV management at nine (9) discrete areas in Utah. Four (4) of the areas are WSAs, known as the Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. App. at 62. At these areas SUWA argued BLM was failing to sufficiently act on FLPMA's "nonimpairment" mandate, and further argued the agency was "failing to consistently implement the terms of its land use management plans" and was failing to act in accordance with BLM's general OHV management regulations. *Ibid.*

The other areas at issue were Section 202 areas, including "lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse

Mesa." App. at 72. At these areas, SUWA argued BLM was failing to act in accordance with its land use plans, BLM's general OHV regulations, and NEPA's implementing regulations addressing a duty to supplement existing NEPA analyses. *Id.* at 73.

On December 22, 2000, the District Court issued a memorandum decision and order granting Petitioners' motion to dismiss and denying SUWA's motion for preliminary injunction as moot. App. at 76-77. The District Court characterized a proper APA section 706(1) as "a very narrow exception to the APA's limitation of judicial review of final agency action." App. at 60. The District Court determined a section 706(1) claim "is essentially the equivalent of mandamus," therefore requiring one to demonstrate the "functions [at issue] constitute clearly defined, peremptory ministerial duties of a government official owed to a complainant." *Ibid.* (citations omitted). The District Court relied heavily on the Ninth Circuit's decisions in *ONRC Action* and *Ecology Center* in concluding that a viable section 706(1) claim must seek to compel action on a "clear statutory duty" and must identify a "genuine failure to act" as opposed to "complaints about the sufficiency of agency action dressed up as an agency's failure to act." *Id.* at 61.

The District Court's handling of SUWA's "nonimpairment" claim illustrates the court's logic. The District Court concluded:

> the decision to close or leave open an existing way in a WSA is far from clear and certain, ministerial, and so plainly prescribed as to be free from doubt. Whether or not "impairment" is

> occurring constitutes precisely the type of administrative determination that is entitled to considerable weight.

App. at 66. The Court observed that "representatives from various BLM Field Offices testified about the management efforts in their respective areas" and concluded that the existence of the agency's management actions precluded section 706(1) review:

> Even if the court were to agree with Plaintiffs that the pace and nature of BLM's actions were inadequate, Plaintiffs still would not have satisfied their onerous burden of demonstrating that the BLM has failed to act. It appears that BLM has taken various actions, many of them recently – perhaps due, at least in part, to this lawsuit – but, steps have been taken nonetheless. Even Plaintiffs stated during their closing arguments, that the BLM has taken "half steps." Thus, this claim must be dismissed.

Id. at 67. Employing similar reasoning, the District Court dismissed the remaining claims in SUWA's motion for preliminary injunction. See App. at 69 (land use plan claim); 71 (executive order and BLM OHV regulations claims); 74 (section 202 area claims rely on regulations which "reek of discretion").

SUWA filed a timely notice of appeal and, upon suggestion of the Tenth Circuit, the District Court certified the dismissed claims for appeal under Federal Rule of Civil Procedure 54(b). App. at 5; 5-6 n.1.

C. The Tenth Circuit Ruling

1. A divided three-judge panel of the Tenth Circuit Court of Appeals reversed. On the WSA "nonimpairment" claim, Circuit Judge Ebel, joined by Judge Lucero, found the nonimpairment mandate did create mandatory, nondiscretionary duties enforceable via section 706(1). App. at 15. Regarding the nature of the agency's discretion to determine whether or how to address possible impairment, the majority concluded these arguments "go to the *merits* of the present suit, and to the *possible remedy* if impairment is found, not to whether federal courts possess *subject matter jurisdiction* under the APA. . . . " *Ibid.* (italics in original). BLM also argued on appeal that section 706(1) could only compel actions that would themselves constitute "final agency action." *Id.* at 17. The majority rejected this argument, concluding that the agency's "failure to comply with the FLPMA's nonimpairment mandate can be considered a final action under [APA] § 704 that is subject to compulsion under § 706(1)." *Id.* at 18. Finally, the majority rejected the "genuine failure to act" rationale, ruling that "just because the BLM attempts to comply with the nonimpairment mandate [does not] deprive[ ] a court of subject matter jurisdiction to determine whether it has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 21.

The Tenth Circuit majority acknowledged the presence of "a few decisions from the Ninth Circuit, suggesting that as long as an agency is taking some action toward fulfilling its legal obligations, courts may not compel compliance under § 706(1)." App. at 22. The majority indicated "[h]owever, with all due respect, we find the Ninth Circuit's analysis on this point unpersuasive." *Ibid.*

In a footnote the majority also acknowledged the Fifth Circuit's *en banc* decision in *Sierra Club v. Peterson*, but concluded that case was limited to analyzing a claim "to enforce the Forest Service's monitoring obligations. . . . " *Id.* at n.13. The majority, at least partly based upon the premise that "BLM is not asserting that is has taken final agency action that should have triggered a statute of limitations barring SUWA's claim," concluded the BLM should not be "insulated from § 706(1) review" in this case. *Id.* at 24.

The majority similarly reversed on SUWA's claims to compel compliance with BLM land management plans. The majority rejected BLM's argument that land use plan requirements are properly interpreted as providing a possible basis for challenge to final agency action under APA section 706(2), finding that SUWA can rely on APA section 706(1) to hold BLM "accountable for failing to act as required by the mandatory duties outlined in [a land management plan]." App. at 29-30. For the same reasons as presented in the "nonimpairment" claim analysis, the majority found "partial efforts toward completing a legally required duty do not prevent a court from compelling action under § 706(1)." App. at 32.

The full panel reversed on the question of whether BLM had taken the required "hard look" at whether increased OHV use triggered a duty to supplement existing NEPA analyses. App. at 41. The panel determined the District Court misconstrued SUWA's claim and stated the claim properly questioned whether BLM could be compelled "to take a hard look at new information suggesting 'significant new circumstances . . . relevant to environmental concerns and bearing' on its management of the disputed lands." App. at 38 (quoting 40 C.F.R.

§ 1502.9(c)(i)-(ii)). The panel held that BLM's arguments identifying practical and logistical challenges associated with conducting NEPA analysis and projections regarding future NEPA analysis were insufficient to preclude review of SUWA's claims seeking to compel a "harder" look via APA section 706(1). App. at 40.

2. Judge McKay dissented from the majority's decision on the "nonimpairment" and land use plan claims. The dissent disagreed with the majority's conclusion that FLPMA's nonimpairment mandate is a ministerial duty susceptible to section 706(1) attack:

> the various mandatory obligations given to agencies are properly viewed on a continuum. On one end are agency obligations that are programmatic in nature, i.e., the BLM's nonimpairment duty. The other end of the continuum represents discrete tasks the agency must perform in order to carry out a portion of its overall duties, i.e., processing a mineral application. The latter are properly challengeable pursuant to § 706(1); the former are not.

App. at 44. Judge McKay contends that the majority position contradicts the holding of *Lujan*, which he reads to "mandate that review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks." *Ibid.* (emphasis in original).

The dissent also rejects the majority's analysis of the "genuine failure to act" cases, and "reiterate[s] that § 706(1) jurisdiction is proper *only* when a plaintiff alleges a true failure to act." *Id.* at 49 (emphasis in original). Judge McKay elaborates:

> Plaintiffs must prove a failure of an agency to take *any* action reasonably calculated to achieve the ends of its mandate. It is unrealistic to expect that every agency action taken in good faith will be completely successful. It is even wider of the mark to label good faith agency efforts that fall short of complete success as "failures to act."

Id. at 50 (emphasis in original). The dissent similarly questions the majority's analysis of the land use plan claims, finding "absolutely no legal support for the proposition that failure to attain all of the goals of a land use plan can properly be challenged pursuant to § 706(1). . . . " *Id.* at 52.

The dissent concludes by predicting the undesirable consequences of the majority's approach. Judge McKay characterizes the new rule as "turn[ing] the burden of proving jurisdiction on its head" by requiring "agency defendants to now prove not only that they have acted but also that their actions have been completely successful. . . . " App. at 53-54. The majority's "unmanageable approach to § 706(1) jurisdiction" will encourage litigation and "shift[ ] to the court what amounts to day-to-day supervision of the level of goal achievement under any agency's plan." *Id.* at 54. Finally, the dissent hypothesizes that agencies will react by adopting "ineffective and passive land use plans" that "are little more than ambiguous and general restatements of the agency's obligations in the first instance." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision significantly expands APA section 706(1) jurisdiction. The Ninth Circuit and the Fifth

Circuit have expressly rejected this approach. This Court has never heard a case squarely presenting section 706(1) jurisdictional issues. Given the newly-created lack of clarity and the far-reaching implications of the Tenth Circuit's analysis for Federal courts and agencies, this Court should grant the Petition and consider the proper boundaries of judicial review under APA section 706(1).

A. The Tenth Circuit's Decision Conflicts with Decisions of Two Other Courts of Appeals.

Until the Tenth Circuit's decision, Circuit Courts have consistently rejected broad, programmatic attacks on agency operations fashioned under APA section 706(1). In the Ninth Circuit such challenges were presented in *ONRC Action* and *Ecology Center*. *ONRC Action* involved an attempt by plaintiffs to force BLM into a region-wide moratorium on logging, road construction, land exchanges and "juniper eradication" pending completion of an environmental impact statement addressing "forests and public lands east of the Cascade Mountains in Oregon and Washington." *ONRC Action*, 150 F.3d at 1134. The *ONRC Action* plaintiffs adopted a two-pronged legal strategy: (1) bait BLM into taking "final agency action" denying the moratorium by submitting an unsolicited "Petition with Request for Stay" to the agency, *Id.* at 1134-1135; and (2) characterize their claims as section 706(1) challenges to BLM's "failure to act" in accordance with duties under NEPA and FLPMA. *Id.* at 1137-1139. The Ninth Circuit rejected both approaches, and affirmed a district court decision dismissing the case for lack of subject matter jurisdiction. The Ninth Circuit considered numerous legal duties arguably at issue, and concluded that no "clear statutory duty" or "clear duty" was identified with which a

court could compel BLM to comply. *Id.* at 1139. In particular, the *ONRC Action* court looked at the same BLM land use planning authority cited by the Tenth Circuit decision. Compare, *Ibid.*, with App. at 27-28 (each analyzing 43 U.S.C. §§ 1712, 1732 and 40 C.F.R. § 1601.0-5). *ONRC Action* concluded "Section 1712 does not . . . establish a clear duty of when to revise the plans, nor does it create a duty to cease actions during such revisions," that "Section 1732 also lacks a statement of clear statutory duty" and that "[t]he provisions in the Federal Regulations relied upon by ONRC also provide no clear duty with which BLM may be required to comply." *ONRC Action*, 150 F.3d at 1139. The Tenth Circuit found the same legal authority created an actionable duty under APA section 706(1).

The Tenth Circuit acknowledged *Ecology Center* but found the Ninth Circuit's logic "unpersuasive." App. at 22. *Ecology Center* involved claims alleging the Kootenai (Montana) National Forest had failed to conduct monitoring required by the National Forest Management Act and the Forest's land management plan. *Ecology Center*, 192 F.3d at 923-924. The Forest admitted it failed to publish required annual reports in two years, and admitted "the reports it published presented *inadequate* results with regard to some of the monitoring items." *Id.* at 924 (emphasis added). The Ninth Circuit affirmed the dismissal of this suit for lack of subject matter jurisdiction. The first basis for this decision was the plaintiffs' failure to challenge final agency action. *Id.* at 924-925. The Ninth Circuit ruled, on independent grounds, that plaintiffs failed to bring a proper section 706(1) claim identifying "a genuine failure to act."

The Tenth Circuit distinguished *Ecology Center* by pointing to the finding that the monitoring activities in

question were not "final agency action" because monitoring reports were "only steps leading to an agency decision, rather than the final action itself." *Id.* at 925; App. at 23. The Tenth Circuit majority then asserted "the nonimpairment mandate . . . is a discrete obligation having independent significance apart from any further final agency action." App. at 23. This seems a questionable distinction, since the *Ecology Center* court would not have needed to reach the section 706(1) claim if the "nonfinality" of the monitoring activities in question was dispositive. Properly understood, *Ecology Center* analyzed and rejected two distinct causes of action.

In distinguishing *Ecology Center* and cases cited therein, the Tenth Circuit majority particularly emphasized that "BLM is not asserting that it has taken final agency action that should have triggered a statute of limitations barring SUWA's claim. . . . " App. at 24. Thus, the majority seemed troubled by the possibility that BLM's OHV management activities would be immune from *any* type of judicial review. The majority misinterpreted the nature of BLM's management actions and the ability of SUWA (or Petitioners) to bring challenges to particular actions taken. Though not fully chronicled in either the District Court or Tenth Circuit decisions, BLM's numerous management actions in the areas at issue plainly include decisions qualifying as "final agency action" sufficient to trigger "arbitrary and capricious" review. The Tenth Circuit decision lists a few of the actions taken, including a BLM "regulation[ ] closing 19 ORV routes in the Sids Mountain WSA and limiting ORV use to *only* 'four designated routes.'" App. at 20 n.11 (emphasis added). Similar closure orders were issued in the Moquith Mountain WSA, Parunuweap WSA, and Behind the Rocks WSA. *Ibid.*

These were agency actions "from which legal consequences . . . flow[ed]." *Bennett*, 520 U.S. at 178. The orders prohibited certain conduct and subjected violators to criminal sanctions. See 43 C.F.R. § 8240.0-7. Petitioners could challenge those actions as illegally restricting OHV access and SUWA could challenge them as instituting an arbitrary and capricious balance in violation of the nonimpairment mandate. The majority relied on an unfounded fear that *Ecology Center's* "failure to act" rule would create a jurisdictional void.

The Fifth Circuit's decision in *Sierra Club v. Peterson* is directly applicable to this case. *Peterson* involved a long-running action, the focus of which "changed several times," generally attacking the Forest Service's "entire program of allowing timber harvesting in the Texas forests." *Peterson*, 228 F.3d at 563. Common throughout the *Peterson* plaintiffs' claims was the allegation that the agency was "failing to protect" forest resources in accordance with statutory mandates. See *Id.* at 564 n.7. Plaintiffs prevailed at a bench trial, and the district court issued a permanent injunction "barring the Forest Service from allowing almost any timber harvesting" until the agency complied with applicable statutes and regulations and "assures the court that any future timber harvesting will be in compliance on-the-ground." *Id.* at 565.

On appeal, a three-judge panel affirmed, but the Fifth Circuit reheard the case *en banc* and reversed. The *en banc* majority first analyzed the claims under *Lujan*, and found them "precisely the type of programmatic challenge that the Supreme Court struck down in *Lujan*." *Id.* at 566. Even though specific final agency actions were identified by plaintiffs, which was not the case in either *ONRC Action* or *Ecology Center*, the majority still rejected the

action as attempting the flawed strategy of "challeng[ing] an entire program by simply identifying specific allegedly-improper final agency actions within that program. . . . " *Id.* at 567.

The *en banc* majority similarly rejected plaintiffs' "alternative theory that the Forest Service 'failed to act.'" *Id.* at 568. In a characterization closely tracking the District Court's reasoning in this case, the majority observed "the Forest Service has been acting, but the environmental groups simply do not believe its actions have complied with the [National Forest Management Act]." *Ibid. Peterson* also notes the "concern that finding no final agency action here 'would put all of the Forest Service's on-the-ground violations . . . beyond review'" but reminds that *Lujan* and other cases direct claimants to "challenge discrete site-specific sales allowed by the Forest Service." *Ibid.* A petition for *certiorari* from the *en banc* decision was filed and denied. 523 U.S. 1051 (2001).

Peterson was recognized but summarily distinguished by the Tenth Circuit majority. The majority concluded *Peterson* "essentially held that the plaintiffs' effort to enforce the Forest Service's monitoring obligations was not justiciable." App. at 22 n.13. *Peterson* repeatedly identifies the claims at issue as a "programmatic" challenge. *Peterson*, 228 F.3d at 566. The specific footnote cited by the Tenth Circuit majority as supporting its proffered distinction begins "[s]ome of the individual acts the environmental groups challenge present their own justiciability problems which the environmental groups seek to avoid by consolidating them into its programmatic challenge." *Id.* at 566 n.11; see App. at 22 n.13. The majority's efforts to distinguish *Peterson* provide no guidance in resolving the new split between the Circuit Courts.

SUWA's claims in this case fall squarely within the split between the Tenth Circuit decision and *ONRC Action, Ecology Center,* and *Peterson.* For instance, the Tenth Circuit majority found that SUWA's "land use plan" arguments identified two valid "failure to act" claims: (1) that "between 1990 and 2000" BLM "failed to maintain a monitoring supervision file specified in the LUP." App. at 27; and (2) the San Rafael "ORV implementation plan" outlined in the land management plan was completed "but . . . only partially implemented." *Ibid.* Despite its efforts, in the FLPMA claim analysis, to distinguish *Ecology Center* and *Peterson* as merely addressing nonjusticiable monitoring duties, the majority concludes, the BLM's *past* failure[2] to maintain a single "monitoring supervision file" creates an actionable section 706(1) claim. Regarding the nonimpairment claims, SUWA, like the *Peterson* and *Lujan* plaintiffs, pursued the strategy of bringing a programmatic challenge to BLM's "failure to prevent impairment" by identifying specific instances of perceived violations within individual WSAs. *See* App. at 66; *Peterson*, 228 F.3d at 568 n.12 ("a plaintiff cannot challenge an entire program simply by referencing specific actions undertaken as part of that program."). The Tenth Circuit's logic cannot be reconciled with the cited decisions.

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[2] BLM began compiling the "monitoring supervison file" in 2000, apparently during the District Court litigation.

B. This Court Has Never Scrutinized APA Section 706(1) Jurisdictional Analysis.

This Court has not been presented with an opportunity to review the reasoning employed by the Tenth Circuit. On several occasions this Court has referred to the existence of section 706(1) jurisdiction. For example, in *Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1986), the Court mentioned the possibility that the claims at issue were justiciable under APA section 706(1) in reaching the merits of a challenge to the actions of the Secretary of Commerce in enforcing international whaling quotas. See also *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980) (footnote explaining one might rely on section 706(1) to "obtain judicial review of prolonged agency inaction" on permit application); *Coit Independence Joint Venture v. Federal Savings and Loan Insurance,* 489 U.S. 561, 590 (1989) (Scalia, J, dissenting). Recently, the Court acknowledged an aggrieved party might rely on section 706(1) to "compel" action on a duty to assign coal industry retirees to a funding entity on or before a statutorily-mandated date. *Barnhart v. Peabody Coal Co.,* 123 S.Ct. 748, 756 n.7 (2003). *Peabody Coal* cites a similar brief discussion, in another footnote, explaining one might utilize section 706(1) to rectify an official's failure to act on a complaint within a specified statutory period. *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986).

None of these decisions address the issue of whether one may seek to compel a mandatory, but discretionary, duty under section 706(1). Nor do they consider the question of whether a section 706(1) claim is precluded by agency action on the duty in question. Rather, the cases reflect passing references to well-settled applications of

section 706(1), such as the proposition that an agency's final decision to "do nothing" can be reviewed under the APA as "effectively final action not acknowledged" or that one may compel an officer to take *some* action on a properly-submitted request invoking a ministerial duty to act. See e.g. *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C.Cir. 1987); *Mount Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997).

The closest treatment of the jurisdictional questions at issue occurred in *Lujan*. The parallels between the *Lujan* analysis of the "final agency action" requirement and section 706(1) review have been noted by many courts, for *Lujan* is frequently discussed in cases considering the availability of section 706(1) review. See e.g. *Peterson*, 228 F.3d at 566-567; *ONRC Action*, 150 F.3d at 1135-1136. *Lujan* does not specifically mention APA section 706(1), but it counsels that judicial review under the APA proceeds according to a "case-by-case approach" which "is the traditional, and remains the normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894. Under this approach, the judiciary "intervene[s] in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Ibid.*

Many courts read *Lujan* to be incompatible with the Tenth Circuit's section 706(1) analysis. However, at least the Tenth Circuit majority reads *Lujan* differently. This case presents an opportunity to squarely address this important jurisdictional disagreement.

C. The Tenth Circuit's Analysis Creates Confusion within Federal Courts and Subjects Administrative Agencies to Unintended and Unmanageable Judicial Oversight.

The Tenth Circuit dissent does not overstate the problems associated with the majority's new analysis. Judge McKay correctly notes "I have yet to discover a single statute indicating that an agency's obligation is anything other than mandatory." App. at 43. Particularly where public land management is involved, Congress issues sweeping, but mandatory, directives to agencies identifying ambitious goals. See e.g. 16 U.S.C. § 1534(a) (agencies "shall establish and implement a program to conserve fish, wildlife, and plants. . . . "); 16 U.S.C. § 1281(a) (providing a designated wild or scenic river "shall be administered in such manner as to protect and enhance the values which caused it to be included in said system . . . "). Under the Tenth Circuit's approach, a claimant could photograph dead fish, wildlife or plants to support an action under section 706(1) to compel "complete" compliance with the cited provision of the Endangered Species Act. The Tenth Circuit's approach allows *any* interested party in the kaleidoscopic public lands debate to sue the agency at any time to "compel" more satisfactory performance on a plaintiff's chosen legal duty. No longer must potential plaintiffs confine their challenges to discrete agency actions which subject them to concrete and particularized injury.

Recent decisions reflect a growing confusion on the fundamental jurisdictional analysis. The Ninth Circuit

now is apparently split within itself, following *Montana Wilderness Assoc. v. U.S. Forest Service,* 314 F.3d 1146 (9th Cir. 2003).[3] That decision, though citing *Lujan* in concluding that certain activities were unreviewable because they fell outside the final agency action requirement, nevertheless found a general allegation of statewide noncompliance with a duty to protect "wilderness character and potential for inclusion in the Wilderness System" actionable under section 706(1). *Id.* at 1151. Distinguishing *Ecology Center* on its facts, the Ninth Circuit ruled "[t]he simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove this case from section 706(1) review." *Ibid.* Other recent decisions reflect a willingness to weaken *Ecology Center's* "genuine failure to act" requirement where agency defendants fail to show "significant indicia of compliance" with statutory duties. *Center for Biological Diversity v. Abraham*, 218 F.Supp.2d 1143, 1162 (N.D.Cal. 2002); *but see*, *National Wildlife Foundation v. Caldera*, 2002 WL 628649 (D.D.C. 2002) (dismissing complaint for "broad programmatic relief" on allegation defendants were failing "to develop a meaningful plan" regarding Florida panther conservation). Confusion now reigns on the questions of when and how courts review claims of agency "failures to act."

In sum, the Tenth Circuit decision conflicts with the decisions of other Circuit Courts and is inconsistent with the most analogous decision of this Court. The confusion within the judiciary and the onerous consequences of the

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[3] A party could still petition for *certiorari* from *Montana Wilderness* as the Ninth Circuit denied a petition for rehearing by order dated April 23, 2003.

Tenth Circuit's approach for administrative agencies punctuate the need for clear guidance from this Court. By granting this Petition the Court can clarify the proper APA section 706(1) jurisdictional analysis.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation; THE WILDERNESS SOCIETY, a national non-profit corporation; SIERRA CLUB, a California non-profit corporation; GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation; WILDLANDS CPR, a Montana non-profit corporation; UTAH COUNCIL OF TROUT UNLIMITED, a Utah non-profit corporation; AMERICAN LANDS ALLIANCE, a national non-profit corporation; and FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs-Appellants

v.

GALE NORTON, Secretary, United States Department of the Interior; NINA ROSE HATFIELD, Acting Director, Bureau of Land Management; and BUREAU OF LAND MANAGEMENT,

Defendants-Appellees,

No. 01-4009

(Filed Aug. 29, 2002)

STATE OF UTAH; SAN JUAN COUNTY; EMERY COUNTY; THE SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION; KANE COUNTY; WAYNE COUNTY, UTAH; UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation; BLUE RIBBON COALITION, an Idaho non-profit corporation; ELITE MOTORCYCLE TOURS, a Utah corporation; and ANTHONY CHATTERLEY,

Defendants-Intervenors-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. No. 2:99-CV-852-K)

James S. Angell, Earthjustice Legal Defense Fund, Denver, Colorado (Heidi McIntosh and Stephen H.M. Bloch, Southern Utah Wilderness Alliance, Salt Lake City, Utah, with him on the briefs), for Plaintiffs-Appellants.

Susan Pacholski, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, (Eileen Sobeck, Deputy Assistant Attorney General, Washington, D.C.; Paul W. Warner, United States Attorney, District of Utah, Salt Lake City, Utah; Stephen

Roth and Jeffrey Nelson, Assistant United States Attorneys, District of Utah, Salt Lake City, Utah; and John A. Bryson, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, with her on the brief), for Defendants-Appellees.

Paul A. Turcke, Moore, Smith, Buxton, & Turcke, Chartered, Boise, Idaho, for Intervenors-Appellees.

Ralph L. Finlayson, Assistant Attorney General, Stephen G. Boyden, Assistant Attorney General, Mark L. Shurtleff, Attorney General, and Stephen H. Urquhart, Office of the Attorney General, Salt Lake City, Utah; John W. Andrews, Utah School and Institutional Trust Lands Administration, Salt Lake City, Utah; filed a brief for State, Counties and Trust Land Administration Intervenors-Appellees.

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

EBEL, Circuit Judge.

The Southern Utah Wilderness Alliance and a number of other organizations (collectively, SUWA) brought suit in the United States District Court for the District of Utah against the Bureau of Land Management (BLM), alleging, among other claims, that the BLM violated the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., by not properly managing off-road vehicle and/or off-highway vehicle (collectively, ORV) use on federal lands that had been classified by the

BLM as Wilderness Study Areas (WSAs) or as having "wilderness qualities." SUWA sought relief under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., claiming that the BLM should be compelled under § 706(1) of the APA to carry out mandatory, nondiscretionary duties required by the FLPMA and NEPA. *See* 5 U.S.C. § 706(1). The district court rejected SUWA's arguments and dismissed the relevant claims for want of subject matter jurisdiction. In reaching this conclusion, the district court reasoned that as long as an agency is taking some action toward fulfilling mandatory, nondiscretionary duties, agency action may not be compelled pursuant to § 706(1). The district court also suggested that the BLM could not be compelled to comply with provisions in a land use plan (LUP) promulgated pursuant to the FLPMA unless or until the BLM undertook or authorized an "affirmative project[ ]" that conflicted with a specific LUP requirement. Finally, the court concluded that the BLM did not abuse its discretion in determining that a supplemental Environmental Impact Statement (SEIS) was not necessary based on new information about increased ORV use.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we **REVERSE** and **REMAND**. Our remand, however, is a narrow one, concluding only that the district court erred in dismissing this case for lack of subject matter jurisdiction and in concluding, at the motion to dismiss stage, that SUWA failed to state a claim that the BLM had a duty to consider a SEIS based on new circumstances. The merits of the claim will need to be addressed on remand.

I. Procedural Background

On October 27, 1999, SUWA filed suit in the district court alleging that the BLM had "failed to perform its statutory and regulatory duties" by not preventing harmful environmental effects associated with ORV use. On November 24, 1999, a group of ORV users (the Recreationists) filed a motion to intervene in the suit, which the district court subsequently granted. Two months after the district court allowed the Recreationists to intervene, SUWA filed a second amended complaint that asserted ten causes of action against the BLM and that sought to have the court compel agency action under § 706(1) of the APA. Three of these claims – that the BLM failed to comply with the FLPMA, refused to implement provisions of various land management plans, and did not take a "hard look" under NEPA at increased ORV use – are relevant to this appeal and will be discussed individually below.

SUWA then moved for a preliminary injunction "to protect nine specific areas from further ORV damage." The Recreationists responded to this motion by arguing that the claims were not actionable under § 706(1) and should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. On December 22, 2000, the district court denied SUWA's preliminary injunction request and granted the BLM's motion to dismiss. The court then certified the dismissed claims as final judgments under Rule 54(b) of the Federal Rules of Civil Procedure, and this appeal followed.[1]

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[1] SUWA filed its notice of appeal before the district court certified the dismissed claims for appeal under Rule 54(b). On February 5, 2001,

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II. Standard of Review

A district court's dismissal of claims under Rule 12(b)(1) is reviewed de novo. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001); *SK Fin. v. La Plata County*, 126 F.3d 1272, 1275 (10th Cir. 1997). Any factual determinations made by the district court in making its jurisdictional ruling are reviewed for clear error. *United Tribe*, 253 F.3d at 547.

III. FLPMA Claim under § 706(1) of the APA

SUWA's first argument on appeal is that the district court's conclusion that § 706(1) of the APA did not give it subject matter jurisdiction over its FLPMA-based claims was erroneous. The core of SUWA's argument is that the FLPMA imposes a mandatory, nondiscretionary duty on the BLM to manage WSAs in such a way that their wilderness values are not impaired. Ongoing ORV use, they allege, is impairing these values, and, therefore, they claim that the BLM must be compelled to prevent

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this court issued a show cause order informing the parties that unless the district court either certified the dismissed claims under Rule 54(b) within thirty days or explicitly adjudicated the remaining claims within thirty days, the appeal would be dismissed. On February 9, 2001, the district court issued Rule 54(b) certification, and, upon receipt of the district court order, the question of appellate jurisdiction was referred to the panel hearing the merits of this case. Given that the parties obtained Rule 54(b) certification within thirty days of our show cause order, the premature notice of appeal is "deemed to [have] ripen[ed] as of the date of certification," and we have "jurisdiction over the appeal." *United States v. Hardage*, 982 F.2d 1491, 1494 (10th Cir. 1993); *cert. denied*, 516 U.S. 1009 (1995); *see Kelley v. Michaels*, 59 F.3d 1055, 1057 (10th Cir. 1995); *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645-46 (10th Cir. 1988) (en banc).

impairment caused by ORV use. For the reasons discussed below, we conclude that the BLM has a mandatory, non-discretionary duty to manage the WSAs in accordance with the FLPMA's nonimpairment requirement. We further conclude that, on the record before us, SUWA has presented a colorable claim that the BLM's present management of the disputed WSAs may be violating the FLPMA's mandate. Consequently, we reverse the district court's dismissal of SUWA's "nonimpairment claim" for want of subject matter jurisdiction under § 706(1).

A. FLPMA

In 1976, Congress enacted the FLPMA, a "complex" and "comprehensive" statute that created a "versatile framework" for governing the BLM's management of public lands. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737-38 (10th Cir. 1982). The Act required that the Secretary of the Interior "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values." 43 U.S.C. § 1711(a); *see Utah v. Babbitt*, 137 F.3d 1193, 1198 (10th Cir. 1998); *Rocky Mountain Oil & Gas*, 696 F.2d at 740. During this inventory process, the Secretary was to identify "roadless areas of five thousand acres or more and roadless islands of the public lands" that possessed "wilderness characteristics."[2]

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[2] The FLPMA incorporates the Wilderness Act of September 3, 1964's definition of "wilderness." *See* 43 U.S.C. § 1782(a). That act, in relevant part, defines "wilderness" as

> an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, . . . which (1) generally appears to have been affected primarily by the forces of nature, with

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42 U.S.C. § 1782(a). The process of identifying lands as having wilderness characteristics involved two steps. First, the BLM conducted an "initial inventory," during which it "identif[ied] wilderness inventory units, which were defined as roadless areas of 5000 acres or more that *may* have wilderness characteristics." *Utah*, 137 F.3d at 1198 (internal quotation marks omitted; emphasis added). After completing this initial inventory, the BLM then conducted an "intensive inventory of these units to determine whether the units possessed wilderness characteristics." *Id.* (internal quotation marks omitted). Areas found by the BLM to possess wilderness characteristics were then designated by the BLM as Wilderness Study Areas, or WSAs.[3] *Id.*; *Sierra Club v. Hodel*, 848 F.2d 1068, 1085 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (en banc). The Act mandated that, within fifteen years of the FLPMA's enactment, the Secretary review the WSAs and recommend to the President which WSAs would be suitable for "preservation as wilderness." 43 U.S.C. § 1782(a). The FLPMA required that, two years

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the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

[3] In 1980, the BLM designated 2.5 million acres of federal land in Utah as WSAs. *See* 45 Fed. Reg. 75,602, 75,603 (Nov. 14, 1980). Four areas designated as WSAs are at issue in this case: Moquith Mountain, Parunuweap Canyon, Sid's Mountain, and Behind the Rocks.

after receiving the Secretary's report, the President submit to Congress "his recommendations with respect to designation as wilderness of each such area." § 1782(b).

The FLPMA, however, provides that only Congress may actually designate land for wilderness preservation. *Id.* Consequently, until Congress either affirmatively designates or expressly rejects a particular WSA for wilderness preservation, the FLPMA mandates that the BLM "*shall continue* to manage" the WSAs "in a manner so as *not to impair* the suitability of such areas for preservation as wilderness." § 1782(c) (emphasis added); *see also Hodel*, 848 F.2d at 1085 (explaining the BLM's obligation to preserve WSAs); *Sierra Club v. Clark*, 774 F.2d 1406, 1408 (9th Cir. 1985) (discussing how areas designated for preservation must not be impaired). Thus, once land is designated as an WSA, the FLPMA imposes an immediate and continuous obligation on the BLM to manage such parcels in such a way that they will remain eligible for wilderness classification should Congress decide to designate the areas for permanent wilderness preservation.[4]

[4] The FLPMA does not explain what the terms "preservation," "wilderness," or "impair" mean. The BLM, however, has interpreted this "nonimpairment" mandate in a document entitled the *Interim Management Policy for Lands Under Wilderness Review* (IMP), which was issued as a federal regulation at 44 Fed. Reg. 72,014. *See Hodel*, 848 F.2d at 1086; *see also Rocky Mountain Oil & Gas*, 696 F.2d at 739 n.6 (explaining that the IMP was "promulgated using notice and comment procedures"). Courts give deference to the BLM's interpretation of the FLMPA, as expressed in the IMP, particularly where language in the FLMPA is ambiguous. *See Hodel*, 848 F.2d at 1087 (deferring to the IMP's reconciliation of tensions within the FLPMA); *Clark*, 774 F.2d at 1409-10 (deferring to the BLM's interpretation of the FLMPA as announced in the IMP); *Rocky Mountain Oil & Gas*, 696 F.2d at 745 ("Where the [FLMPA] is ambiguous, we must afford deference to the

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Hodel, 848 F.2d at 1085; *Interim Management Policy for Lands Under Wilderness Review* (IMP) at 5 (Aplt. App. at 192).

B. 706(1) of the APA

Section 706(1) of the APA provides that federal courts "shall" "compel agency action unlawfully withheld or unreasonably delayed."[5] 5 U.S.C. § 706(1); *see also Forest*

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interpretation given the statute by the agency charged with its administration.").

According to the IMP, "Management to the nonimpairment standard does not mean that the lands will be managed as though they had already been designated as wilderness." Rather the nonimpairment standard requires the BLM "to ensure that each WSA satisfies [the definition of wilderness] at the time Congress makes a decision on the area." "The Department therefore has a responsibility to ensure that the existing wilderness values of *all* WSAs . . . are not degraded so far, compared with the areas's values for other purposes, as to significantly constrain the Congress' prerogative to either designate a WSA as a wilderness or release it for other uses" (emphasis in original).

As part of the nonimpairment mandate, the IMP mandates that the BLM may only authorize "non-impairing" activity in the WSAs. Under the IMP, use of WSA land will be considered "non-impairing" if two criteria are met. First, the use must be temporary in nature, meaning that it does not "*create surface disturbance* or involve permanent placement of structures" (emphasis added). The IMP defines "surface disturbance" as "any new disruption of the soil or vegetation which would necessitate reclamation." Second, after the activity terminates, "the wilderness values must not have been degraded so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness."

[5] Although the district court indicated that its disposition of this case would have been the same regardless of whether the SUWA suit was characterized as one seeking to compel "unreasonably delayed" action or "unlawfully withheld" action, it concluded that SUWA's claim amounted to one alleging an unreasonable delay. The district court,

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Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) ("Through § 706 Congress has stated unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed" (emphasis added).); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) ("Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.").

Under either the "unreasonably delayed" or "unlawfully withheld" prongs of § 706(1), federal courts may order agencies to act only where the agency fails to carry out a

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invoking our decision in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), reasoned that this action fell under the "unreasonably delayed" category because "there are no 'date-certain deadlines' by which [the] BLM's ORV management must operate." Unlike the district court, we believe that SUWA's nonimpairment claims fall in the "unlawfully withheld" category.

We explained in *Forest Guardians* that "if an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions . . . , a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act." 174 F.3d at 1190.

As discussed above, the FLPMA imposes an immediate and continuous obligation on the BLM to manage a parcel designated as a WSA in such a way that its wilderness values are not impaired and the land always remains eligible for designation as permanent wilderness areas at any moment Congress might decide to give them that status. *See* 43 U.S.C. § 1782(c). We conclude that Congress did impose an absolute deadline by which the BLM has to prevent impairment because this duty begins the moment the land is designated as a WSA and continues until Congress makes a decision regarding permanent wilderness designation. While Congress did not state this deadline in a date specific manner, it nonetheless created a deadline: the time when Congress makes the decision on wilderness designation.

mandatory, nondiscretionary duty.[6] *Forest Guardians*, 174 F.3d at 1187-88. By contrast, if a duty is not mandated, or if an agency possesses discretion over whether to act in the first instance, a court may not grant relief under § 706(1). *Id.* at 1187-89.

Importantly, compelling agency action is distinct from ordering a particular outcome. Courts have regularly held that an agency may be required to take action and make a

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[6] Courts have often explained that the standards for compelling agency action through a writ of mandamus and through § 706(1) are very similar, even though the availability of relief under the APA precludes mandamus relief. *See, e.g., Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The availability of a remedy under the APA technically precludes [a] request for a writ of mandamus, although the mandatory injunction is essentially in the nature of mandamus relief" (citations omitted).); *Yu v. Brown*, 36 F. Supp. 2d 922, 928-29 (D.N.M. 1999) ("Seeking to harmonize the Mandamus Statute with the APA, the Tenth Circuit has held that, since mandamus requires that no other remedy be available and the APA provides a means of challenging . . . agency action, technically mandamus relief is no longer available in such cases. However, the court has also recognized [the similarity between mandamus relief and relief under the APA]" (citation omitted).); *see also Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506-07 (9th Cir. 1997) (analyzing a mandamus claim under § 706(1) because of similarities in the relief). There is, however, an important distinction between compelling agency action through a writ of mandamus and through § 706(1). Even if a party shows that the "prerequisites [for a writ of mandamus] have been met, a court still exercises its *own discretion in deciding whether or not to issue the writ.*" *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) (emphasis added); *see also Marathon Oil*, 937 F.2d at 500 ("[T]he issuance of the writ is a matter of the issuing court's discretion."). By contrast, once a court determines that an agency "unlawfully withheld" action, the APA requires that courts compel agency action. *Forest Guardians*, 174 F.3d at 1187-88 (explaining that the use of the word "shall" in § 706 means courts "*must* compel agency action unlawfully withheld").

decision even if the agency retains ultimate discretion over the outcome of that decision. In *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167 (10th Cir. 1997), for example, this court rejected the Secretary of the Interior's claim that he could not be compelled to process a mining patent application because it was not clear that the parties were "unquestionably entitled to a patent." *Id.* at 1172. Instead, we held that the Secretary could be ordered to comply with statutorily-mandated processing requirements even if the Secretary ultimately had discretion over whether to approve the application. *Id.*; *see also Marathon Oil*, 937 F.2d at 500 (upholding district court order to process applications but reversing order instructing approval of applications as exceeding court's authority); *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (ordering the Secretary of Health and Human Services to promulgate regulations).

C. Analysis of FLPMA Claim

SUWA acknowledges that the BLM possesses considerable discretion over how it might address activity causing impairment. Nonetheless, SUWA argues that the BLM can be ordered to comply with the FLPMA's nonimpairment mandate, even if the BLM retains discretion over the means of prevention.

The BLM and the Recreationists respond by offering several reasons as to why ORV use in the relevant lands is not subject to § 706(1) review and cannot be considered impairment. First, they argue that the IMP's nonimpairment mandate "affords BLM discretion in not only *how* it will act, but also *whether* it will act," thus removing the agency's inactions from review under § 706(1). Second, the

Appellees, particularly the BLM, contend that § 706(1) may only be invoked where "final, legally binding actions . . . have been unlawfully withheld or unreasonably delayed." Third, assuming the BLM has a mandatory duty to prevent ORV-caused impairment, they argue that SUWA's claim is, in reality, a challenge to the sufficiency of the BLM's efforts to prevent impairing activity caused by ORV use rather than a claim that the BLM has failed to act. Undertaking our de novo review, we first address the arguments raised by the BLM and the Recreationists.

1. Discretion under Nonimpairment Mandate

As touched on above, the BLM first argues that the district court's dismissal of SUWA's impairment for lack of subject matter jurisdiction claims was proper because the BLM has "considerable discretion . . . to determine both what constitutes impairment and what action to take if it finds that impairment is occurring or is threatened."

The BLM's argument, however, misses the narrow jurisdictional issue presented on appeal, i.e., whether the BLM has a nondiscretionary, mandatory duty that it may be compelled to carry out under § 706(1). Neither side seriously disputes that the BLM has such a duty under the FLPMA, which mandates that the BLM manage WSAs in such a way as not to impair their wilderness values. *See* 43 U.S.C. § 1782(c). In this case, the district court conceded that SUWA offered colorable evidence suggesting that ongoing ORV activity in the WSAs has seriously impaired the wilderness values of the WSAs at issue, acknowledging in its decision that SUWA had "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use."

Certainly, the BLM is correct in arguing, as it does on appeal and as it did before the district court, that we must give considerable deference to its interpretation of the nonimpairment mandate, *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Lamb v. Thompson*, 265 F.3d 1038, 1047 (10th Cir. 2001); *Kurzet v. Comm'r*, 222 F.3d 830, 844 (10th Cir. 2000), particularly as laid out in the *Interim Management Policy for Lands Under Wilderness Review* (IMP), a BLM-promulgated regulation that significantly interprets the FLPMA's nonimpairment mandate. *See Hodel*, 848 F.2d at 1087; *Rocky Mountain Oil & Gas*, 696 F.2d at 745. As we have previously explained, as long as "an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Mission Group Kan., Inc. v. Riley*, 146 F.3d 775, 780 (10th Cir. 1998) (internal quotation marks omitted). Similarly, the BLM is correct that, to the extent the IMP and the FLPMA give it substantial discretion in deciding how it will implement the FLPMA's nonimpairment mandate and address potentially impairing activities, a court's ability to compel it to take specific steps to prevent impairment is curtailed, *see, e.g.*, *Mt. Emmons*, 117 F.3d at 1172; *Marathon Oil*, 937 F.2d at 500, a point SUWA concedes.

The BLM's arguments, however, go to the *merits* of the present suit, and to the *possible remedy* if impairment is found, not to whether federal courts possess *subject matter jurisdiction* under the APA to order the BLM to comply with the FLPMA's nonimpairment mandate. The BLM seems to confuse the principle that, when deciding *whether* an area is being impaired, courts must give deference to the BLM's interpretation of the FLMPA's nonimpairment

mandate, with the statutory standard making the nonimpairment obligation mandatory. Similarly, the BLM appears at times to assume erroneously that because it possesses discretion over the *implementation* of the nonimpairment mandate, the nonimpairment obligation is itself wholly discretionary. We do not address on this appeal whether ORV use in the region is impairing the WSA's wilderness values. Upon remand, the district court will have to address that issue after analyzing the evidence before it and giving appropriate deference to the IMP. Such deference and discretion do not, however, immunize the BLM from its clear, nondiscretionary duty "to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. § 1782(c), as compelled by § 706(1).[7] Should, therefore, the district conclude that the alleged ORV use represents a failure by the BLM to manage the disputed WSAs in accordance with the FLPMA's nonimpairment mandate, it must compel the agency to comply with its legal duty. *Forest Guardians*, 174 F.3d at 1187.

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[7] The IMP gives specific attention to ORV use when discussing impairing activity. For example, the IMP specifically notes that "[c]ross-country vehicle use off boundary roads and existing ways" constitutes surface disturbance – specifically defined as "impairing" activity under the IMP – because "the tracks created by the vehicles leave depressions or ruts, compact the soils, and trample or compress vegetation." The regulation also holds that vehicles may not drive off "existing trails" except (1) in emergency situations, (2) by state or federal officials to protect human life, safety, and property, (3) where the area was designated for ORV use prior to FLPMA, or (4) where the vehicle will be traversing on sand dunes or snow areas that have been designated for that type of recreational activity. Similarly, the IMP indicates that recreational activities normally permitted within WSAs may be restricted if they "depend upon cross-country uses of motor vehicles."

2. Final Action Argument

On appeal, the BLM also asserts that § 706(1) only applies to "final, legally binding actions that have been unlawfully withheld or unreasonably delayed." Apparently, the BLM believes that a court may only compel agency action under § 706(1) if the unlawfully withheld action would itself be considered a "final" action under § 704 of the APA, which limits judicial review to final agency actions.[8] 5 U.S.C. § 704. According to the BLM, § 706(1) is not available for "day-to-day management actions," which, in its view, includes dealing with the ORV use at issue in this case. In essence, the BLM seems to argue that, because it could prevent impairment by ORV use through steps that might not themselves be considered a final agency action, federal courts lack subject matter jurisdiction under § 706(1) over these "day-to-day" decisions.

We find the BLM's finality argument unpersuasive, for it seems to read finality in an inappropriately cramped manner. Contrary to the implications of the BLM's argument, the APA treats an agency's inaction as "action." 5 U.S.C. § 551(13) (defining "agency action" as including a "failure to act"). Where, as here, an agency has an obligation to carry out a mandatory, nondiscretionary duty and

[8] Section 704 defines the limits of federal courts' power to review actions by administrative agencies, declaring, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Agency action, in turn, is defined as including "the whole or a part of agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (explaining definition of agency action).

either fails to meet an established statutory deadline for carrying out that duty or unreasonably delays in carrying out the action, the failure to carry out that duty is itself "final agency action." Once the agency's delay in carrying out the action becomes unreasonable, or once the established statutory deadline for carrying out that duty lapses, the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty. *See Coalition for Sustainable Res., Inc. v. United States Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001) (explaining circumstances in which agency inaction may be considered "final"); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure to so act constitutes, in effect, an affirmative act that triggers 'final agency action' review."). *Cf.* Daniel P. Selmi, *Jurisdiction To Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65, 99-101 (1996) (discussing constructive final agency action); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 652-55 (1983) (explaining that finality may be found when an agency fails to act by a statutorily imposed deadline or unreasonably delays acting). Consequently, contrary to the BLM's argument, the Bureau's alleged failure to comply with the FLPMA's nonimpairment mandate can be considered a final action under § 704 that is subject to compulsion under § 706(1).[9] Therefore, the failure of an agency to

[9] Courts have implicitly recognized that unlawfully withheld actions are considered final under § 704. Some emphasize, for example, that an agency must carry out nondiscretionary duties required by law, without discussing whether the withheld duty would be considered a

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carry out its mandatory, nondiscretionary duty either by an established deadline or within a reasonable time period may be considered final agency action, even if the agency might have hypothetically carried out its duty through some "non-final" action.[10]

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final agency action. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577 (9th Cir. 2000); *Forest Guardians*, 174 F.3d at 1187-88 (collecting Tenth Circuit cases explaining that an agency must carry out nondiscretionary duties). Courts have sometimes described § 706(1) as an exception to the APA "finality" requirement. *See, e.g., Independence Mining Co.*, 105 F.3d at 511 (citing *Public Citizen v. Bowen*, 833 F.2d 364, 367 (D.C. Cir. 1987), and *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 30-32 (D.C. Cir. 1984)). This description may be slightly inaccurate, however, for § 704 of the APA defines the type of agency actions subject to judicial review and, in relevant part, limits judicial review to final agency actions. 5 U.S.C. § 704. Section 706(1), by contrast, defines the "scope" of judicial review over reviewable agency actions. *Id.* § 706; *see also Aladjem v. Cuomo*, No. CIV-A-96-6576, 1997 WL 700511, at *3 n 2 (E.D. Pa. Oct. 30, 1997).

[10] The BLM's argument has other weaknesses. First, it seems somewhat in tension with established precedent holding that an agency may be compelled to make a decision or implement a duty, even if the agency retains discretion over how it will carry out that duty. *See, e.g., Mt. Emmons*, 117 F.3d at 1172; *Marathon Oil*, 937 F.2d at 500; *Yu*, 36 F. Supp. 2d at 931. Second, the BLM's position would seem to create a "no-man's-land" of judicial review, in which a federal agency could flaunt mandatory, nondiscretionary duties simply because it might be able to satisfy these duties through some form of non-final action. Third, in this case, it is clear that many of the steps the BLM might take to address impairment caused by ORV use *would* be considered final agency actions. Indeed, as all parties acknowledge, some of the Recreationists who intervened in this suit have brought a separate lawsuit challenging the BLM's decision to close certain ORV routes in the disputed WSAs. Closing roads, fining unauthorized ORV users, licensing some users but not others, issuing new rules restricting ORV use, etc., possibly could all fall within the definition of a final agency action. *See* 5 U.S.C. § 551(13).

Accordingly, we reject the BLM's "final, legally binding" argument.

3. Partial Compliance

Even if it has a mandatory duty to prevent ORV-induced impairment, the BLM argues that it cannot be compelled to act under § 706(1) because it has taken some partial action to address impairing ORV activity. By and large, the district court rested its jurisdictional ruling on this rationale, reasoning that the BLM could not be compelled to comply with the nonimpairment mandate because the BLM "presented significant evidence about the steps it is and has been taking to prevent [ORV-caused] impairment." We disagree.

It is undisputed that, at least since the instigation of litigation, the BLM has taken some action, including closing certain roads and posting signs indicating that ORV use is prohibited in certain areas, to address alleged impairment of the WSAs caused by ORV use.[11] However,

[11] For example, on March 21, 2000, the BLM issued regulations closing 19 ORV routes in the Sids Mountain WSA and limiting ORV use to only "four designated routes." The record further indicates that the BLM erected signs and barricades closing ORV routes and sought assistance from local ORV and environmental groups to effectuate restrictions on ORV use.

In the Moquith Mountain WSA, the BLM began combating increased ORV use in 1993 by posting signs, sponsoring educational programs, and increasing limited law enforcement patrols. In 1998, the BLM followed up on these efforts by closing a number of ORV routes. The BLM also indicated that it was planning additional measures where compliance with these measure [sic] has not been as successful as hoped.

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the mere fact that the BLM has taken some action to address impairment is not sufficient, standing alone, to remove this case from § 706(1) review, as the BLM would have us hold. Indeed, if we were to accept the BLM's argument, we would, in essence, be holding that as long as an agency makes some effort to meet its legal obligations, even if that effort falls short of satisfying the legal requirement, it cannot be compelled to fulfill its mandatory, legal duty. Certainly, the BLM should be credited for the actions it has taken to comply with the nonimpairment mandate; it does not follow, however, that just because the BLM attempts to comply with the nonimpairment mandate, it thereby deprives a court of subject matter jurisdiction to determine whether it has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled.[12]

As to the third WSA area, the Parunuweap WSA, the BLM published a management order in August 2000 limiting ORV use to designated travel routes and prohibiting cross-country ORV travel outside these areas. During testimony before the district court in 2000, the BLM also indicated that it had planned educational programs on ORV use, had ordered signs that would be posted on closed ORV routes in the area, and would be mailing ORV information to interested parties within several weeks, though it is not entirely clear whether the BLM ever implemented these plans.

Finally, between 1990 and 2000, the BLM prohibited ORV travel in the Behind the Rocks WSA, placed information on bulletin boards explaining ORV restrictions, and posted signs and/or dragged objects in front of unauthorized ORV routes. According to testimony in the record, the BLM also monitored ORV activity in the region.

[12] Imagine, for example, that applicable federal law prohibited logging in a national forest, yet the BLM only prohibited logging on half the forest, permitting, for one reason or another, logging on the remaining half. The logic of the BLM's argument would have us hold that, because the BLM successfully prevented logging on half, it could

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In support of its argument, the BLM invokes a few decisions from the Ninth Circuit, suggesting that as long as an agency is taking some action toward fulfilling its legal obligations, courts may not compel compliance under § 706(1). And, indeed, in *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922 (9th Cir. 1999), the Ninth Circuit refused to grant relief under § 706(1) where the "Forest Service merely failed to conduct its duty in strict conformance with [a Forest] Plan and NFMA Regulations."[13] *Id.* at 926.

However, with all due respect, we find the Ninth Circuit's analysis on this point unpersuasive. First, in *Ecology Center*, the Ninth Circuit refused to compel the Forest Service to conduct monitoring activities in strict compliance with a forest plan and federal regulations because doing so "would discourage the Forest Service from producing ambitious forest plans." 192 F.3d at 926. Whether requiring a federal agency to comply with its own regulations would discourage that agency from enacting the regulations in the first place, however, is irrelevant for § 706(1) purposes. Our inquiry under §706(1) is not whether, as a policy matter, particular outcomes would be

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not be ordered to prevent logging on the remaining half, notwithstanding the BLM's failure to satisfy its legal obligation to prevent logging in the forest.

[13] The Recreationists also cite to the Fifth Circuit case of *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (en banc). However, we do not believe that case supports the BLM's position. Rather, it essentially held that the plaintiffs' effort to enforce the Forest Service's monitoring obligations was not justiciable. *Id.* at 566-68 & n.11. There is no suggestion in that case that jurisdiction over the monitoring claim failed because of partial monitoring activity by the Forest Service.

encouraged or discouraged, but whether the agency has unlawfully withheld or unreasonably delayed a legally required, nondiscretionary duty. *Cf. Forest Guardians*, 174 F.3d at 1187-88 (explaining that § 706(1) requires a court to compel agency action once it has determined that the agency had withheld a legally required duty). Further, the court in *Ecology Center* viewed the monitoring activity as merely precursor data-gathering activity to support later planned final agency action in amending or revising a forest plan. By contrast, here the nonimpairment mandate obligation of the BLM is a discrete obligation having independent significance apart from any further final agency action.

Ecology Center also quoted the D.C. Circuit's decision in *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105 (D.C. Cir. 1988), warning that "[a]lmost any objection to agency action can be dressed up as an agency's failure to act" and cautioning courts against entertaining § 706(1) suits where an agency has taken some action. 845 F.2d at 1108. We find, however, that *Public Citizen* is readily distinguishable. At issue in *Public Citizen* was the Nuclear Regulatory Commission's issuance of nonbinding regulations "for the training and qualifications of nuclear power plant personnel." *Id.* at 1106. A relevant federal statute required the agency to issue binding regulations, and the appellant in that case sued, seeking to compel the agency to issue binding regulations. *Id.* Applicable federal statutes, however, required the appellant to bring suit challenging final agency actions or an alleged failure to act within, at most, 180 days of the agency's decision or inaction, a deadline the appellant clearly missed if measured by the issuance of the nonbinding regulations. *Id.* at 1107. Consequently, the issue directly before the D.C.

Circuit was not whether the agency's issuance of nonbinding regulations insulated it from § 706(1) review, but whether the issuance of the nonbinding regulations was sufficient action to start the running of the 180-day statute of limitations period, notwithstanding the nonbinding nature of the regulations. The D.C. Circuit found the nonbinding regulations were "a formal product of the Commission, published in the Federal Register, and expressly stat[ed] [by the agency] that it is responsive to the mandate of the Nuclear Waste Policy Act." *Id.* at 1108. Thus, by the clear statement of the agency itself, the issuance of the nonbinding regulations was intended to be final agency action, which triggered the running of the statute of limitations. The statute of limitations could not be circumvented merely by arguing that the agency's performance was inadequate and thus should be considered an ongoing failure to act, resulting in an ever-green cause of action for failure to act.

The situation in the case before us is totally different. Here, it is alleged that the BLM is in ongoing violation of a duty to prevent impairment of the WSAs. That is an independent duty, and the BLM is not asserting that it has taken final agency action that should have triggered a statute of limitations barring SUWA's claim. We, therefore, disagree with the notion that *Public Citizen* stands for the proposition that any time an agency takes some steps toward fulfilling a legal obligation, it is insulated from § 706(1) review.

Nevada v. Watkins, 939 F.2d 710 (9th Cir. 1991), another Ninth Circuit decision cited by the BLM, also is inapposite. The court there simply held that the issuance of preliminary guidelines for evaluating a nuclear waste disposal site was not a final agency action because Congress,

in the Nuclear Waste Policy Act, declared that such conduct should not be deemed final agency action. *Id.* at 714 n.11. Obviously, we have no such clear congressional determination here. Accordingly, we reject the BLM's contention that, because it has taken some steps to address impairment caused by ORV use, it is immune from § 706(1) review.[14]

D. Conclusion Regarding FLPMA Claim

In summary, we find that the BLM has a mandatory nondiscretionary duty to prevent the impairment of WSAs and in this case, as the district court acknowledged in its decision, SUWA's complaint presents colorable evidence suggesting that ongoing ORV use has or is impairing the disputed WSAs' wilderness values, possibly in violation of the FLPMA's nonimpairment mandate. The fact that the BLM could, in theory, prevent the allegedly impairing ORV use through means other than a final agency action, and that the BLM is taking some steps to prevent ORV-induced impairment, does not deprive the district court of subject matter jurisdiction under § 706(1) to consider the issue. Therefore, we reverse the district court's conclusion that it lacked subject matter jurisdiction over SUWA's impairment claims. On remand, the district court, giving

[14] This is not to suggest that the agency's attempted compliance is totally irrelevant to § 706(1) proceedings. In *Forest Guardians*, for example, we rejected the argument that budgetary constraints could excuse the Secretary of Interior's "fail[ure] to perform a nondiscretionary duty." 174 F.3d at 1191. Nonetheless, we held that budgetary constraints could be considered when deciding what remedy the court should impose for the alleged violation or whether the Secretary should be held in contempt. *Id.*

appropriate deference to the IMP's definition of impairment, must determine whether the BLM has, in fact, failed to comply with the FLPMA's the nonimpairment mandate.

IV. Duties under the Land Use Plans

SUWA also alleges on appeal that the BLM failed to carry out a mandatory duty to manage several areas "in accordance with [their] land use plans."

The district court dismissed the SUWA's LUP-based claims on two grounds. The district court reasoned on the one hand that, under relevant regulations, compliance with forest management plans is "limited only to affirmative projects either approved or undertaken after the RMP is in place; [the applicable regulation] does not require that further planning activities contemplated by the plan actually take place." Because SUWA's complaint did not focus on "some site-specific action," the district court concluded that the BLM could not be compelled under § 706(1) to comply with the "monitoring" and ORV-implementation plans promised in LUPs. Alternatively, the district court explained, SUWA's claims were simply a challenge to "the sufficiency of [the] BLM's actions, rather than a failure to carry out a clear ministerial duty."

On appeal, the BLM urges us to affirm based on the reasons identified by the district court. In addition, the BLM argues that LUPs do not create mandatory, nondiscretionary duties because LUPs "are not Congressional mandates, and they are subject to contingencies, such as availability of funds, personnel and the presence of competing priorities." We find the arguments articulated by the BLM and the district court unpersuasive.

A. LUPs

The FLPMA requires the Department of the Interior and the BLM to "manage the public lands . . . in accordance with the land use plans [LUPs] developed . . . under section 1712 [of the FLPMA]." 43 U.S.C. § 1732(a). Section 1712, in turn, identifies a number of criteria and concerns that must be taken into account in developing LUPs. *Id.* § 1712(a), (c); *see also* 43 C.F.R. § 1610.2 (discussing public participation in LUPs).

At issue in this case are the LUPs for lands characterized as the "Factory Butte and San Rafael areas." It is undisputed that in 1990, an LUP identified Factory Butte as a region requiring special monitoring for ORV use, stated that the "[t]he area will be monitored and closed if warranted," and indicated that "[r]esource damage will be documented and recommendations made for corrective action." The BLM acknowledges that between 1990 and 2000 it did not fully comply with the Factory Butte monitoring pledge. In particular, it failed to maintain a monitoring supervision file specified in the LUP.

In 1991, the BLM created the San Rafael LUP, which called for designation of ORV trails "following completion of an ORV implementation plan," which was scheduled to be completed within one year of the LUP's approval. In turn, the ORV implementation plan was to develop criteria for determining what areas in San Rafael would be open to ORV use. During the course of the litigation, the BLM admitted that it prepared an ORV implementation plan on October 6, 1997, but that it had been only partially implemented.

B. LUP Claim

As an initial matter, we reject the BLM's contention that it did not have a mandatory, nondiscretionary duty to carry out the activities described in the disputed LUPs. The Factory Butte and San Rafael LUPs declare that Factory Butte "will be monitored" for ORV use and that an ORV implementation plan for San Rafael "will be developed." The FLPMA, in turn, unequivocally states that "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him." 43 U.S.C. § 1732(a); *see also Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1299 (10th Cir. 1999) (noting how the BLM "shall manage" lands in accordance with LUPs); *Natural Res. Def. Council, Inc. v. Hodel*, 618 F. Supp. 848, 858 (E.D. Cal. 1985) (same). Relevant regulations similarly provide that the BLM "will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." 43 C.F.R. § 1601.0-5(c). Therefore, a straightforward reading of the relevant LUPs, as well as applicable statutes and regulations, suggests that the BLM must carry out specific activities promised in LUPs.

It is true, as the BLM and the Recreationists argue, that Congress intended LUPs to be dynamic documents, capable of adjusting to new circumstances and situations. *See* H.R. Rep. No. 94-1163, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6179, *quoted in Natural Res. Def. Council, Inc. v. Hodel*, 624 F. Supp. 1045, 1059 (D. Nev. 1985) ("The term 'land use planning' is not defined in [the] bill because it is a term now in general usage and permits a large variety of techniques and procedures and various alternatives."). The BLM can draft LUPs in a way that optimizes the agency's ability to respond to changing circumstances and conditions. However, the BLM cannot

"ignore the requirements of the Forest Plan."[15] *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999); *see also Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376-77 (9th Cir. 1998) (same); *Ore. Natural Res. Council Action v. United States Forest Serv.*, 59 F. Supp. 2d 1085, 1094-95 (W.D. Wash. 1999) (same). Similarly, the BLM's right (in accordance with applicable environmental statutes, such as NEPA) to amend or alter existing LUPs does not free the agency from carrying out present obligations. Just as the BLM can be held accountable for failing to act with regard to its nonimpairment duty, it also can be held accountable for failing to act as required by the

[15] The BLM invokes the Supreme Court's decision in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), to support its claim that courts cannot compel compliance with LUPs under § 706(1) because "agency plans are programmatic planning documents which are subject to continual review and refinement." We find *Ohio Forestry* inapposite. *Ohio Forestry* does not stand for the proposition that the Forest Service cannot be compelled to conform its current conduct to LUPs. Rather, the Court held in *Ohio Forestry* that an environmental interest group's challenge to a forest plan allowing logging within a national forest was not ripe because, before any logging could occur, the Forest Service had to "focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court." 523 U.S. at 734. Contrary to the BLM's argument that *Ohio Forestry* held that a forest plan was merely a planning document with no legal effect, the Supreme Court said that "in [the] absence of [Plan authorization] logging could not take place." *Id.* at 730; *see also* Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of Ohio Forestry*, 21 Pub. Land & Resources. L. Rev. 81, 107 (2000) (explaining that, even after *Ohio Forestry*, "agency decisions to ignore their own regulations are reviewable under the APA as final agency actions or failures to act"). Further, the plan provisions under review in *Ohio Forestry*, unlike the Plan provision being asserted here, do not purport to establish immediate obligations on the Forest Service but only set forth broad preconditions for further action.

mandatory duties outlined in an LUP. Therefore, a colorable claim of failing to adhere to LUP duties provides a court with subject matter jurisdiction to consider whether the failure to act warrants relief under § 706(1).

C. Future Action Argument

We also find unconvincing the BLM's claims that it is required to comply with the mandates of a LUP only when it undertakes a future, site-specific project. Undeniably, many federal lawsuits involving forest plans arise when a federal agency authorizes a particular action within a forest without complying with specific plan requirements. *See, e.g., Sierra Club v. Martin*, 168 F.3d 1, 3 (11th Cir. 1999); *Utah Envtl. Cong. v. Zieroth*, 190 F. Supp. 2d 1265, 1268 (D. Utah 2002); *Forest Guardians v. United States Forest Serv.*, 180 F. Supp. 2d 1273, 1277-78 (D.N.M. 2001). Nothing in the FLPMA, however, indicates that the BLM is required to comply with LUPs only when it undertakes some future, site-specific action. Some Plan provisions may only restrict future, site-specific action, *see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), while other Plan provisions may restrict the agency's ongoing conduct or impose immediate duties on the agency even in the absence of future, site-specific proposals. As to the latter provisions, such as the ones at issue here, they have by their own terms immediate effect on the BLM. As discussed above, the FLPMA simply and straightforwardly declares, "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him." 43 U.S.C. § 1732(a); *see also Public Lands Council*, 167 F.3d at 1299 (noting how the BLM "shall manage" lands in accordance with LUPs). It does not suggest that management "in accordance" with LUPs will occur only

when some discrete post-plan action occurs, or that the BLM is not obligated to follow through on and carry out specific actions, such as monitoring for ORV use, promised in a LUP. Likewise, some regulations suggest that the BLM must comply [sic] the LUP requirements. *See* 43 C.F.R. § 1601.0-5(c) (explaining that the BLM "*will adhere* to the terms, conditions, and decisions of officially approved and adopted resource related plans").

The BLM invokes certain regulatory provisions that state that *future* management actions must conform to approved plans. *See* 43 C.F.R. § 1610.5-3(a); *see also* 43 C.F.R. § 1601.0-2. However, those regulations do not in any manner suggest that the BLM is relieved from implementing ongoing actions if they are specifically promised in the LUP itself. The BLM suggests that inaction cannot constitute a violation of a LUP. But the failure to implement a program specifically promised in an LUP carries the same effect as if the agency had taken an "affirmative" or "future" action in direct defiance of its LUP obligations. *Cf. Coalition for Sustainable Res.*, 259 F.3d at 1251; *Thomas*, 828 F.2d at 793. As such, a court may compel the BLM to carry out a duty imposed by an LUP that has been unreasonably delayed or unlawfully withheld.[16] *See Martin*, 168 F.3d at 4.

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[16] The BLM's refusal to adhere to promised monitoring programs, such as those discussed in the Factory Butte LUP, is in tension with regulations mandating that LUPs "establish intervals and standards, as appropriate, for monitoring and evaluation of the plan" and that forest managers "shall be responsible for monitoring and evaluating the plan in accordance with the established intervals and standards." 43 C.F.R. § 1610.4-9.

Accordingly, we reverse the district court to the extent it dismissed SUWA's LUP-based claims on the ground that the BLM's obligation to comply with LUP is only triggered by "some [future] site-specific action taken by the BLM."

D. Partial Compliance

For the reasons outlined in our discussion of SUWA's nonimpairment claims, we also reverse the district court's conclusion that the BLM cannot be compelled under § 706(1) to comply with the LUP requirements because, "while the BLM's actions have not been carried out to the letter [of the LUPs], there has not been a complete failure to perform a legally required duty that would trigger review under § 706(1)." As previously explained, partial efforts toward completing a legally required duty do not prevent a court from compelling action under § 706(1). However, when the district court reviews the merits on remand, it can take into account the LUP's mechanism for addressing changing circumstances and conditions in determining the scope of the duties involved and the agency's attempted compliance.[17]

[17] On appeal, there has been some suggestion by the parties that SUWA's LUP claims, particularly with regard to the Factory Butte area, are now moot because the BLM implemented the LUP requirements after SUWA instituted the present litigation. On remand, the district court should consider whether some or all of the SUWA's LUP-based claims are moot, though we note that the Supreme Court has cautioned against finding a claim moot where a party ends the challenged, allegedly illegal conduct after the filing of a lawsuit, unless it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (emphasis in original, internal quotation

(Continued on following page)

E. LUP Conclusion

In summary, we find that the district court improperly dismissed SUWA's LUP-based claims for want of subject matter jurisdiction. Contrary to the suggestions of the district court and the BLM, we hold that the BLM did have a mandatory, nondiscretionary duty to comply with the Factory Butte LUP's ORV-monitoring provision and the San Rafael LUP's ORV-implementation provision. We reject the BLM's arguments that (1) LUPs cannot impose mandatory, nondiscretionary duties and/or (2) can only impose mandatory duties when an affirmative, future, and site-specific action occurs. And, for reasons previously discussed, we reject the suggestion that the BLM's efforts towards compliance with the LUP obligations, delayed for over a decade, preclude § 706(1) review.

V. NEPA

The third issue presented on appeal centers around the National Environmental Policy Act (NEPA) and the BLM's alleged failure to take a "hard look" at information suggesting that ORV use has substantially increased since the NEPA studies for the disputed areas were issued. SUWA contends that, under § 706(1), the BLM should be compelled to take a hard look at this information to decide whether a supplemental environmental impact statement (SEIS) or supplemental environmental assessments should be prepared for certain affected areas. In particular, SUWA argues that the BLM's most recent NEPA analyses for the

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marks omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (same).

San Rafael Swell, Parunuweap, Behind the Rocks, and Indian Creek areas are dated and do not account adequately for recent increases in ORV activity.[18]

The BLM argues that it should not be compelled to take a hard look at the increased ORV use because it is "planning to conduct NEPA analysis of the nature of impacts of current levels of OHV use in all [the relevant] areas within the next several years," subject to resource constraints. The BLM further argues that SUWA failed to raise its "hard look" argument before the district court, instead "resting only on [the] BLM's alleged 'failure to produce supplemental environmental impact statements.'" Significantly, the BLM does not directly dispute on appeal that the alleged ORV use requires a hard look, and it concedes that, "on a nation-wide level, it needs to revise many of its land management plans."

In its discussion of SUWA's NEPA claim, the district court initially acknowledged that SUWA was seeking to compel the BLM to take a "hard look" at the ORV information. Yet it then rejected SUWA's hard look claim on the ground that a court could not compel the BLM to prepare supplemental NEPA analyses based on the present record, suggesting in the process that SUWA was seeking to compel the production of a SEIS.

For the reasons discussed below, we believe that the district court misinterpreted SUWA's claim and applied

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[18] SUWA specifically challenges a 1990 environmental assessment (EA) for the Henry Mountains area, a 1991 EIS for the San Rafael Swell area, a 1980 EA for the Parunuweap area, a 1985 EA for the Behind the Rocks area, and a 1991 EIS for the Indian Creek area.

the wrong analysis, and we find that the BLM's arguments for affirming the district court's ruling unconvincing. Consequently, we reverse the district court's decision.

A. Supplemental Analysis under NEPA

Under NEPA, "'major Federal actions significantly affecting the quality of the human environment' must be preceded by an environmental impact statement or EIS." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992) (citation omitted). Before creating an EIS, however, a government agency may prepare a document called an environmental assessment (EA). *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1214 (10th Cir. 1997). If after preparing the EA, the agency concludes that a proposed action will not significantly affect the environment, the agency may issue a "finding of no significant impact" (FONSI) and "need not prepare a full EIS." *Id.*; *see* 40 C.F.R. § 1501.4(e). The primary goal of NEPA is to make sure a government agency carefully gathers and evaluates relevant information about the potential impact of a proposed agency action on the environment and that this information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). NEPA does not require an agency to reach a particular substantive outcome. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 371 (1989); *Envtl. Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1374 (10th Cir. 1980).

Due to this emphasis on informed decisionmaking, federal regulations require government agencies to prepare an SEIS or a supplemental EA (1) if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or (2) "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise.[19] 40 C.F.R. § 1502.9(c)(i)-(ii); *see also Marsh*, 490 U.S. at 372-73; *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1177-78 (10th Cir. 1999). As the Supreme Court explained, "It would be incongruous with th[e] approach to environmental protection . . . for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh*, 490 U.S. at 371.

This court and the Supreme Court have recognized, however, that an agency does not have to supplement an EIS or an EA "every time new information comes to light." *Id.* at 373; *Friends of the Bow*, 124 F.3d at 1218 (quoting *Marsh*). "To require otherwise," the Supreme Court has observed, "would render agency decisionmaking intractable, always awaiting updated information only to find new information outdated by the time a decision is made." *Marsh*, 490 U.S. at 373. Instead, "[t]he issue is whether the subsequent information raises new concerns of sufficient gravity such that another, formal in-depth look at the

[19] The standard for preparing a supplemental EA is the same as for preparing an SEIS. *See Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d at 566 & n.2 (9th Cir. 2000); *Friends of the Bow*, 124 F.3d at 1218 & n.3.

environmental consequences of the proposed action is necessary." *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *see also S. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-64 (3d Cir. 1999) (same).

In evaluating an agency's decision not to develop a SEIS or supplemental EA, courts utilize a two part test. First, they look to see if the agency took a "'hard look' at the new information to determine whether [supplemental NEPA analysis] is necessary." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1177 (9th Cir. 1990); *see also Marsh*, 490 U.S. at 374; *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 286 (4th Cir. 1999). In applying the hard look test, courts may consider whether the agency "obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, [] responds to all legitimate concerns that are raised," *Hughes River*, 165 F.3d at 288 (citing *Marsh*, 490 U.S. at 378-85), or otherwise provides a reasoned explanation for the new circumstance's lack of significance. Second, after a court determines that an agency took the requisite "hard look," it reviews an agency's decision not to issue an SEIS or a supplemental EA under the APA's arbitrary and capricious standard. *Marsh*, 490 U.S. at 377; *Colo. Envtl. Coalition*, 185 F.3d at 1178; *Friends of the Bow*, 124 F.3d at 1218; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. Hardlook [sic] Claim

Turning to the merits of the parties' arguments, we initially conclude that SUWA properly raised its "hard

look" claim before the district court. A review of the district court proceedings indicates that SUWA claimed that the "BLM's failure to take [a] 'hard look' . . . is a clear violation of NEPA's requirements." In advancing this argument, SUWA distinguished the first step of supplemental NEPA review (whether an agency took a hard look at new information) from the second step (whether the agency acted arbitrarily and capriciously in not issuing an SEIS or a supplemental EA) and made clear it was challenging the BLM's failure to take a "hard look," not whether the BLM acted arbitrarily and capriciously in refusing to prepare a supplemental NEPA analysis. While SUWA did include a rhetorical flourish suggesting that "should the agency take the required hard look, the inescapable conclusion of that analysis must be that the 'new circumstances' . . . require supplemental NEPA," the BLM apparently recognized that SUWA was asserting a "failure to take a 'hard look' " claim and responded accordingly. Consequently, we conclude that SUWA adequately raised and preserved its claim that the BLM should be compelled to take a hard look at new information suggesting "significant new circumstances . . . relevant to environmental concerns and bearing" on its management of the disputed lands. 40 C.F.R. § 1502.9(c)(i)-(ii). Further, we conclude the district court erred by resolving SUWA's claim on the ground that, based on the evidence currently before it, an actual SEIS or supplemental EA could not be ordered.

C. Future NEPA Action

We also believe that the BLM is misguided in claiming that because it will be undertaking NEPA analysis in the near future, a court cannot, or, at the very least, should

not, require it to take a hard look at the increased ORV use. The BLM's assertion that it hopes to fulfill, or even will fulfill, its NEPA obligations in the future does not address its current failures to act. *Cf. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) ("[W]e are unmoved by the Secretary's claim that it would be futile to prepare supplemental EISs . . . when its new Resources Management Plans and accompanying EISs will address all the relevant information.").

Similarly, the BLM's claim that it should not be compelled to take a hard look at present ORV use because it faces budget constraints and because requiring such a review "would only divert BLM's resources from its current and planned NEPA work" is unavailing. The BLM's budgetary argument wrongly conflates financial constraints with the legal issue in this case: whether the BLM is required to take a hard look at increased ORV use under NEPA. An agency's lack of resources to carry out its mandatory duties, we have reasoned, does not preclude a court from compelling action under § 706(1). *Forest Guardians*, 174 F.3d at 1189 n.14 (holding that the unavailability of resources cannot be used as a defense against an action to compel an agency to carry out its mandatory, nondiscretionary duties); *see also id.* at 1192 ("Wisely, the Secretary does not press the argument that inadequate congressional appropriations relieved him of his ESA duties. We could not accept that argument if it had been raised. . . ."). Instead, we have explained, an inadequate resource defense must be reserved for any contempt proceedings that might arise if the agency fails to carry out a mandatory duty after being ordered to do so by a court. *Id.* (expressing sympathy for the resources

argument and noting that it "could arise at the contempt stage").

Additionally, we find the BLM's claim that it should not be compelled to take a hard look at increased ORV use because it intends to conduct NEPA reviews in the near future problematic in light of its budget-based arguments. The BLM's extensive discussion about the budgetary woes confronting it, as well as its concession that "limited resources will prevent [the] BLM from undertaking all of its desired [NEPA] planning efforts immediately," raise serious questions about the likelihood of a future hard look actually occurring. Our concern on this score is only increased by the BLM's failure to offer a concrete time table for when its NEPA activities will occur; all the BLM suggests is that further NEPA review will occur over the next "several" or "few" years.

Accordingly, we conclude that the district court erred in concluding that it could not order the BLM to take a hard look at the information presented by SUWA. *Cf. Hughes River*, 81 F.3d at 446 (concluding that Agency violated NEPA by not taking a hard look at information before declining to issue a SEIS).

VI. Conclusion

In our view, the district court erroneously concluded that because the BLM has taken some steps toward addressing alleged ORV-caused impairment and toward complying with LUP requirements, it lacked subject matter jurisdiction under § 706(1) of the APA. We also find that the district court mistakenly believed that the BLM is only bound by the requirements of LUPs when it undertakes "affirmative, future actions" that conflict with mandatory

LUP duties. Finally, we further conclude that the district court misapprehended the nature of SUWA's NEPA claim. The alternative grounds for affirming the district court's ruling offered by the BLM, including its claim that unlawfully withheld action may only be compelled under § 706(1) if the withheld action, once carried out, would be considered final agency action, are unpersuasive. Accordingly, we **REVERSE** the district court's decision and **REMAND** for proceedings consistent with this opinion.

McKAY, Circuit Judge, concurring in part and dissenting in part:

While I concur in the result reached by the majority as to Appellants' NEPA claim, I respectfully dissent in all other respects.

I. Misconstruing the BLM's Nonimpairment Obligation

The court's failure to follow well-established precedent which mandates that we determine the scope of § 706(1) jurisdiction by a mandamus standard leads to its unwarranted conclusion that any mandatory agency obligation is amenable to attack pursuant to § 706(1) of the APA. Maj. op. at 7. The majority opinion does not, and cannot, cite a single case from any court justifying this novel proposition.

Our ability to grant injunctive relief under § 706(1) is governed by a standard similar to the one used in evaluating requests for mandamus relief. *See Mount Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d

502, 507 (9th Cir. 1997). "Mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, *ministerial* duty." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (citations omitted) (emphasis added). In § 706(1) actions, plaintiffs must demonstrate either "agency recalcitrance [ ] in the face of [a] clear statutory duty[, or agency recalcitrance] 'of such a magnitude that it amounts to an abdication of statutory responsibility. . . .'" *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (quoting *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984).

I agree with the majority that BLM's FLPMA obligation is both mandatory and continuous. This observation, however, reveals but a portion of Appellees' burden in establishing jurisdiction pursuant to § 706(1). Because we employ a mandamus standard when evaluating § 706(1) jurisdiction, § 706(1) plaintiffs must also prove that they are challenging a *ministerial* agency obligation. *See Marathon Oil*, 937 F.2d at 500. Ministerial is defined as "an act that a person after ascertaining the existence of a specified state of facts performs in obedience to a mandate of legal authority *without the exercise of personal judgment upon the propriety of the act and usually without discretion in its performance. . . .*" Webster's Third New Int'l Dictionary (1986) (emphasis added). The BLM's nonimpairment FLPMA obligation is not remotely ministerial.

The majority concedes the well-settled rule that the propriety of jurisdiction pursuant to § 706(1) must be determined in accordance with our mandamus jurisprudence. Maj. op. at 12-13, n.6. The majority also concedes that the BLM's nonimpairment obligation is generally stated and involves a substantial amount of discretion in

the manner in which the BLM meets its obligation. *Id.* at 14. Despite conceding the very points that establish the fact that the BLM's FLPMA nonimpairment duty is not ministerial is [sic] nature, the majority's opinion nonetheless maintains that Appellants may challenge the BLM's alleged failure to meet its nonimpairment obligation pursuant to § 706(1)'s provisions.[1]

Despite recognizing, as it must, that § 706(1) jurisdiction is properly analyzed under our mandamus jurisprudence, the thrust of the majority's position is that any mandatory duty, regardless of how generally stated and regardless of the amount of discretion given to the agency in the performance of its duty, is challengeable pursuant to § 706(1). Additionally, the majority in no way limits its novel interpretation of § 706(1) jurisdiction to the environmental field. Apparently, as set out in the majority opinion, any mandatory obligation of any United States agency could be challenged using § 706(1) as a jurisdictional basis.

The majority's position ignores reality by placing all agency obligations, regardless of the discretion granted to the agency in carrying out the particular obligation, into one category – mandatory obligations. Statutory directives by their nature are mandatory. I have yet to discover a single statute indicating that an agency's obligation is

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[1] The requirement that the agency's obligation be ministerial in nature has also been expressed as a requirement that the agency's obligation be "a plainly defined and preemptory duty." *Hadley Mem'l Hosp., Inc. v. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982) (citations omitted). The BLM's nonimpairment obligation simply cannot be viewed as either ministerial or a plainly defined and preemptory duty.

anything other than mandatory. The reality is that the various mandatory obligations given to agencies are properly viewed on a continuum. On one end are agency obligations that are programmatic in nature, i.e., the BLM's nonimpairment duty. The other end of the continuum represents discrete tasks the agency must perform in order to carry out a portion of its overall duties, i.e., processing a mineral application. The latter are properly challengeable pursuant to § 706(1); the former are not.

The majority's position directly contradicts the Supreme Court's mandate that review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990). Plaintiffs "cannot seek *wholesale* improvement of [an agency] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* at 891 (emphasis in original). In sum, § 706(1) of the APA cannot be used as a jurisdictional vehicle for claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities.[2]

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[2] The Supreme Court observed that

> [t]he case-by-case approach . . . require[d] is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife. . . . But this is the traditional, and remains the normal, mode of operation of the courts. . . . Assuredly[, it is] not as swift or as immediately far-reaching a corrective process as those interested in systematic improvement

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The problem with the majority's position is revealed through the use of a simple example. The Immigration and Naturalization Service has a mandatory, ongoing, and continuous obligation to "enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens."[3] 8 C.F.R. § 2.1 (2002). Applying the court's apparent conclusion that any mandatory duty can be challenged pursuant to § 706(1), the failure of the INS to enforce the immigration laws could be

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would desire. Until confided to us, however, more sweeping actions are for the other branches.

National Wildlife Fed'n, 497 U.S. at 894. "Courts are not equipped, nor are they the proper body, to resolve the technical issues involved in agency decisionmaking at 'a higher level of generality.'" *Sierra Club v. Peterson*, 228 F.3d 559, 569 (5th Cir. 2000) (citing *National Wildlife Fed'n*, 497 U.S. at 894). Few, if any, of the BLM's obligations are expressed at a higher level of generality than the BLM's nonimpairment duty pursuant to FLPMA.

[3] There are a host of mandatory, ongoing, continuous agency obligations that are now subject to attack pursuant to the majority's view of § 706(1) jurisdiction. Another example is the Fish and Wildlife Service's obligation to utilize its authority to "seek to conserve endangered species and threatened species." *See* 16 U.S.C. § 1531(c)(1) (2000) (declaring Congress' policy that all federal departments and agencies have an obligation to protect endangered species). The majority offers no explanation to differentiate the mandatory, ongoing, and continuous nature of such agency obligations from the BLM's nonimpairment obligation established by FLPMA. Thus, the majority's view of § 706(1) exposes agencies to attack by plaintiffs who believe that the INS is not properly enforcing all of the immigration laws or that the Fish and Wildlife Service is not sufficiently utilizing its authority to seek and conserve endangered species. Rather than preserve our WSAs (or ensure the INS enforces all of the immigration laws or that the Fish and Wildlife Service utilizes its authority to conserve endangered species) the majority's view of § 706(1) jurisdiction improperly permits plaintiffs unsatisfied with the day-to-day operations of various government agencies to attempt to control these operations through litigation.

properly challenged pursuant to § 706(1). Thus, any individual unhappy with the INS' efforts to prevent the entry of all illegal aliens (despite the laws prohibiting the entry of illegal aliens and the INS' duty to enforce these laws) could bring a lawsuit pursuant to § 706(1) for the INS' "failure to act." Despite our prior case law holding to the contrary, nothing in the majority opinion would constrain the granting of a writ of mandamus ordering the INS to enforce the immigration laws. *See, e.g., Smith v. Plati*, 258 F.3d 1167, 1179 (10th Cir. 2001) (mandamus "not ordinarily granted to compel police officers to enforce the criminal laws") (quotation omitted). The majority's novel interpretation of § 706(1)'s jurisdictional scope permits exactly this incongruous result.

This expanded view of § 706(1) jurisdiction becomes even more apparent when considering the potential remedies available to plaintiffs challenging any mandatory agency obligation. Our prior cases reveal that when we grant a writ of mandamus, the remedy provided within the writ guarantees correction of the error petitioner claimed in the first instance. The writ's ability to correct the problem complained of necessarily requires that the duty challenged be ministerial in nature. *See, e.g., Hulsey v. West*, 966 F.2d 579, 582-83 (10th Cir. 1992) (mandamus granted ordering the district court to ensure petitioner's right to jury trial); *McNeil v. Guthrie*, 945 F.2d 1163, 1168 (10th Cir. 1991) (mandamus granted requiring district court clerk to file pro se papers in class action suit); *Journal Publ'g. Co. v. Mechem*, 801 F.2d 1233, 1237 (10th Cir. 1986) (mandamus writ issued ordering district court to dissolve previous order regarding press contact with jury pool that was over broad); *Hustler Magazine, Inc. v. United States Dist. Court*, 790 F.2d 69, 71 (10th Cir. 1986)

(mandamus writ issued requiring district court to conduct a "full and adequate hearing" regarding motion to change venue); *Herrera v. Payne*, 673 F.2d 307, 308 (10th Cir. 1982) (mandamus writ issued compelling district court to attach statement of reasons in order denying a certificate of probable cause as required by Fed. R. App. P. 22(b)).

A similar result occurs when a remedy is granted in a suit brought against agencies for a failure to act pursuant to § 706(1). *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1999) (compelling agency to designate a critical habitat for the silvery minnow); *Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D.N.M. 1999) (compelling INS to process plaintiff's application for special immigrant juvenile status). On remand, I can think of no remedy the district court could construct that would guarantee a correction of the agency failure alleged in the first instance – BLM's full compliance with its nonimpairment duty. At most and at worst, the remedy granted would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate. Quite simply, even if ORV use was entirely banned inside WSAs, the BLM's compliance with such a remedy still would not guarantee that the WSAs would not be impaired in the future.

The majority's opinion essentially transforms § 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations. The Supreme Court has specifically rejected this approach. *See National Wildlife Fed'n*, 497 U.S. at 894 (APA improper method of making programmatic attacks on agency obligations).

II. Unwarranted Expansion of "Failure to Act"

In addition to an unwarranted expansion of § 706(1) threshold jurisdiction, the majority opinion compounds its error by improperly expanding the definition of § 706(1)'s failure to act requirement to include not only true agency inaction but also all agency action which falls short of completely achieving the agency's obligations. This unique interpretation of "failure to act" incorrectly conflates the concepts of action and achievement. Once again, I do not dispute that the BLM must comply with its nonimpairment mandate and must manage WSAs in a manner that prevents impairment. For § 706(1) jurisdictional purposes, however, this is not the issue. Instead, the issue is whether Appellants may use § 706(1) to challenge an agency's failure to completely comply with its obligations as a "failure to act." The facts in this case do not support such a conclusion.

Because nearly every objection to agency action could be cleverly pleaded as agency inaction, § 706(1) jurisdiction exists "only when there has been a genuine *failure* to act." *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); *see also Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) (emphasis added). Complaints about the sufficiency of agency action disguised as failure to act claims are not cognizable pursuant to § 706(1). *See Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000); *Ecology Ctr.*, 192 F.3d at 926; *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991).

The majority's summation of Appellants' claims reveals the true nature of Appellants' complaint – insufficiency of agency action disguised as a failure to act claim.

Appellants assert that the BLM is "not properly managing off-road vehicle and/or off-highway (collectively ORV) use on federal lands that had been classified by the BLM as Wilderness Study Areas." Maj. op. at 3. Appellants' objections are not based upon a true failure to act; instead, they address an alleged failure of the BLM to achieve complete success in its efforts to comply with the BLM's nonimpairment obligation.[4] Section 706(1) is unquestionably an inappropriate jurisdictional basis for such claims. *See, e.g.*, *Sierra Club*, 228 F.3d at 568; *Ecology Ctr.*, 192 F.3d at 926; *Watkins*, 939 F.2d at 714.

The majority's assertion that an "agency's attempted compliance is[n't] totally irrelevant to § 706(1) proceedings" misses the mark completely. Maj. op. at 27, n.14. Not only is an agency's attempted compliance "not totally irrelevant," it is *the essential* inquiry in determining whether § 706(1) jurisdiction can be properly invoked. I reiterate that § 706(1) jurisdiction is proper *only* when a plaintiff alleges a true failure to act. *Sierra Club*, 228 F.3d at 568; *Ecology Ctr.*, 192 F.3d at 926. The majority maintains that any action taken by an agency that does not

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[4] The example in footnote twelve of the majority opinion has no application to this case. It assumes that the BLM is either acting in bad faith or taking final agency action inconsistent with its statutory mandate. I agree that bad faith attempts to comply with an agency's obligations is equivalent to no action at all. However, in the present case no one alleges that the BLM is acting in bad faith.

In order to log on BLM lands, permits are required. Assuming that the land had been set aside for activities other than logging (as the majority does), granting a logging permit would represent a final agency action properly challengeable pursuant to the APA as a final agency decision. *See* 5 U.S.C. § 704 (1996). Section 704, not § 706(1), would provide the proper jurisdictional basis for such a challenge.

result in complete success in the carrying out of mandatory obligations is properly challengeable as a *failure* to act. The burden properly placed on § 706(1) plaintiffs is much more rigorous than that. Plaintiffs must prove a failure of an agency to take *any* action reasonably calculated to achieve the ends of its mandate. It is unrealistic to expect that every agency action taken in good faith will be completely successful. It is even wider of the mark to label good faith agency efforts that fall short of complete success as "failures to act."

III. Creating a New Agency Obligation

The court's improper disposition of Appellants' land use plan claim is due in part to its erroneous view of the scope of § 706(1) jurisdiction and in part to its creation of a new agency obligation that before today the BLM did not possess. Statutorily, BLM's obligation is to manage its lands "in accordance with the land use plans." 43 U.S.C. § 1732(a) (1986). Additionally, 43 C.F.R. § 1610.5-3(a) (2001) states that "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning[ ] shall conform to the approved plan."

The court asserts that once the BLM develops a land use plan it is required to achieve every single aspect of that plan. It accepts Appellants' argument that allowing the BLM to ignore the affirmative management provisions in its own plans will "make a charade of the BLM land planning, public participation, and NEPA processes." Aplt. Br. at 43. The effect of the majority's opinion is that any failure (regardless of how small) to live up to every aspiration expressed in the BLM's land management plans

would entitle Appellants to challenge such failure pursuant to § 706(1).

Correctly viewed, however, the BLM's land plans are aspirational. While the BLM is prevented from approving or undertaking affirmative projects inconsistent with its land use plans, the BLM is not required to meet each and every specific goal set forth in its land use plans or face potential litigation jurisdictionally based on § 706(1) for failing to act. Affirmative projects or final agency decisions inconsistent with land use plans are properly challenged as final agency actions, not as failures to act. Importantly, successful challenges to land use plans have only involved *final* agency decisions made pursuant to existing land use plans. *See, e.g., Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376, 1382 (9th Cir. 1998) (remanding approval of a timber sale not in conformity with forest plan); *Oregon Natural Res. Council Action v. United States Forest Serv.*, 59 F. Supp. 2d 1085, 1097 (W.D. Wa. 1999) (enjoining timber sale approved before completion of wildlife survey as required by the management plan). I was unable to locate a single case supporting the majority's view.

The court's position is belied by the stated purpose of resource management planning, which is to provide "a process for the development, approval, maintenance, *amendment and revision* of resource management plans." 43 C.F.R. § 1601.0-1 (2001) (emphasis added). Thus, the regulations envision plans that are dynamic, flexible, and that properly balance the competing objectives of the various groups interested in public lands. Requiring an agency to meet every one of its original aspirational objectives denies the intended nature of resource planning. Inherent in the process is the understanding that even well-intended

objectives may prove unfruitful in obtaining desired results. Necessarily, a change in approach will be warranted on occasion. Permitting plaintiffs to challenge a land use plan under the guise of a failure to act because each and every objective of the land use plan has not been met would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations. The Supreme Court has specifically rejected this notion. *National Wildlife Fed'n*, 497 U.S. at 894 (courts are not the correct place to make programmatic attacks on agencies).

The district court concluded that the BLM's obligation on its face is "limited only to affirmative projects either approved or undertaken after the [Resource Management Plan] is in place; it does not require that further planning activities contemplated by the plan actually take place." Aplt. App. at 865. I agree. The regulations specifically grant a right to challenge an agency decision or amendment that violates a plan's provision. "Any person adversely affected by a specific action *being proposed to implement* some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation." 43 C.F.R. § 1610.5-3(b) (2001) (emphasis added). The regulations tellingly contain no reference of any kind to the rights of an individual to challenge an agency's failure to meet each and every goal set forth in its land use plans.

I have found absolutely no legal support for the proposition that failure to attain all of the goals of a land use plan can properly be challenged pursuant to § 706(1), nor does the majority opinion cite any. It seems odd to me that, if a plaintiff could properly challenge an agency's failure to reach all of its objectives in its land use plans pursuant to § 706(1), not a single plaintiff has ever prevailed in any

court on such a theory. Today the court permits Appellants to potentially proceed on a land management plan claim based upon a previously nonexistent agency obligation.

IV. Consequences of the Majority's Approach

The unwarranted and unsupported decision to judicially expand § 706(1) jurisdiction in a way never envisioned by any other court or Congress and the creation of a previously unrecognized agency obligation might be more palatable if the end result of the endeavor promised significant public policy benefits. Unfortunately, I am convinced that the opposite is true. Instead of assisting agencies in the laudable goal of preserving our nation's precious environmental resources, the effect of the court's decision will likely make the successful protection of our environment even more difficult.

Perhaps the most obvious consequence of this expansion of § 706(1)'s scope is the future syphoning of scarce BLM (and other agencies') resources intended to meet its worthy objectives and obligations to fund increasing unmerited litigation. However narrowly intended, the court's opinion has opened the floodgates of litigation for plaintiffs to challenge any mandatory agency obligation regardless of the amount of discretion afforded to the agency in carrying out its obligations.

Additionally, today's decision turns the burden of proving jurisdiction on its head. It is well accepted that the burden of proving jurisdiction is properly placed on the party invoking jurisdiction (plaintiffs). *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (citation omitted). Instead, today's decision requires agency defendants to now prove not only that they have acted but

also that their actions have been completely successful, rather than properly placing the burden on plaintiffs to prove an agency's true failure to act.

The additional problem with the court's unique view of § 706(1)'s jurisdictional scope is that it is not amenable to reasonable judicial standards. For example, there is no standard as to the proper time when a plaintiff may challenge an agency's failure to comply one hundred percent with a statutory obligation. If an agency's obligation is viewed as mandatory, continuous, and immediate, nothing here prevents a plaintiff from challenging an agency's failure to successfully and completely comply with its statutory obligation the very next day. This unmanageable approach to § 706(1) jurisdiction shifts to the court what amounts to day-to-day supervision of the level of goal achievement under any agency's plan.

In addition to encouraging increasing amounts of unmerited litigation, the logical consequence of this greatly expanded jurisdiction is the creation of ineffective and passive land use plans. If an agency can be forced into litigation for any failure to completely achieve the goals it sets for itself in its desire to *reach or exceed* its statutory obligation, the agency's likely reaction will be to adopt land use plans that are little more than ambiguous and general restatements of the agency's obligations in the first instance. Such a result would severely constrain an agency's ability to use its expertise and discretion to protect the environment and would hinder the aggressive and successful management of the WSAs that all parties desire.

In sum, I am of the view that the court today has embraced three novel concepts: 1) the BLM's nonimpairment obligation is a ministerial duty subject to attack

pursuant to § 706(1); 2) any failure of the BLM (no matter how slight) may provide jurisdiction for a "failure to act" challenge pursuant to § 706(1); and 3) the BLM's (and other agencies') failure to achieve each and every aspiration of its land use plans with completely successful results opens it to potential litigation for "failing to act."

IV. Conclusion

Because I view the BLM's nonimpairment obligation pursuant to FLPMA as nonministerial in nature and since only ministerial agency duties are properly subject to attack pursuant to § 706(1)'s provisions, I would affirm the district court's decision to dismiss this claim for lack of jurisdiction. *See Marathon Oil*, 937 F.2d at 500. I would also affirm the district court's decision to dismiss Appellants' land use plan claim because that claim is based on a non-existent duty. The BLM simply is not required to achieve each and every goal of its aspirational land use plans or have that failure, however slight, be challenged pursuant to § 706(1).

Appellants are not without remedy; but, on the facts of this case, Congress has limited the remedy to that provided by § 706(1). Thus, I do concur with the result the majority reaches in remanding Appellants' NEPA claim to determine whether the BLM has truly failed "to take a 'hard look' at information suggesting that ORV use has substantially increased since the NEPA studies for the disputed areas were issued." Maj. op. at 37.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE, et al. **Plaintiffs,** **vs.** **BRUCE BABBITT et al.,** **Defendants,** **and** **UTAH SHARED ACCESS ALLIANCE, et al.,** **Defendant-Intervenors,** **and** **SAN JUAN COUNTY, UTAH, et al.** **Defendant-Intervenors.**	**MEMORANDUM DECISION AND ORDER** **(Filed Dec. 22, 2000)** **Case No. 2:99CV852K**

This matter is before the court on numerous motions: (1) Plaintiffs Southern Utah Wilderness Alliance, the Wilderness Society, the Sierra Club, the Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, Americans Lands Alliance, and the Friends of the Abajos' ("Plaintiffs") Motion for a Preliminary Injunction; (2) Plaintiffs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action; (3) Defendants Bruce Babbitt, Tom Fry and the Bureau of Land Management's ("BLM") Motion to

Dismiss Plaintiffs' Ninth Cause of Action with Prejudice; (4) Defendant-Intervenors Utah Shared Access Alliance, Blue Ribbon Coalition, Elite Motorcycle tours, and Anthony Chatterley's ("Recreationists") Motion to Dismiss. An evidentiary hearing on Plaintiffs' Motion for a Preliminary Injunction was held on August 28, 2000 through August 31, 2000. At that hearing, Plaintiffs were represented by Heidi J. McIntosh, Stephen H.M. Bloch, and Robert B. Wiygul. BLM was represented by Stephen Roth and Jeffrey E. Nelson. Recreationists were represented by Paul A. Turcke. Defendant-Intervenors State of Utah, Emery County, Grand County, Kane County, San Juan County, and Wayne County (the "State") was represented by Stephen G. Boyden, Stephen H. Urquhart, and David Blackwell. The State of Utah Institutional Trust Lands ("SITLA") was represented by John W. Andrews. A hearing on the Recreationists' Motion to Dismiss and on Plaintiffs' supplemental NEPA claim was held on December 13, 2000. At that hearing, Plaintiffs were represented by James S. Angell and Stephen H.M. Bloch. BLM was represented by Stephen Roth, Recreationists were represented by Paul A. Turcke, and the State was represented by Stephen G. Boyden.

Before both hearings, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to this motion, the testimony of the witnesses presented at the preliminary injunction hearing and the prior hearing on Plaintiffs' motion for a temporary restraining order, and the arguments presented by counsel. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

Plaintiffs have moved the court for a preliminary injunction to prevent the alleged "substantial off-road vehicle ("ORV") damage and impairment to" BLM lands. Plaintiffs contend that BLM is required by federal law to ensure that ORVs do not impair WSAs and to permit ORV use only where the BLM has ensured that it has minimized both environmental impacts and impacts to visitors who do not use ORVs. However, Plaintiffs claim that BLM has failed to perform its statutory and regulatory duties.

The court is faced with the antithetical views of Plaintiffs, on one hand, arguing that they are entitled to the extraordinary relief of a preliminary injunction based on the BLM's alleged failure to carry out its mandatory duties, and Recreationists on the other hand, contending that, not only should the court decline to issue an injunction, but it should go so far as to dismiss Plaintiffs' claims as they pertain to the areas that are the subject of the preliminary injunction motion. Their motion is based on their claim that Plaintiffs have failed to demonstrate that this court has jurisdiction under 5 U.S.C. § 706(1). BLM argues that an injunction should not issue, based on the same jurisdictional argument made by Recreationists, but BLM has declined to join in Recreationists' motion to dismiss Plaintiffs' claims.

Because this court agrees that Plaintiffs have not satisfied their heavy jurisdictional burden in this case and that the claims at issue should be dismissed, Plaintiffs' motion for injunctive relief is moot. Thus, the court will address the parties' claims and arguments in the context of Recreationists' motion to dismiss.

II. RECREATIONISTS' MOTION TO DISMISS

Recreationists argue that Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction under FRCP 12(b)(1). They claim that Plaintiffs' First, Fifth, Sixth, Seventh,[1] and Ninth Causes of Action, at least as they pertain to the areas at issue in the preliminary injunction motion, must be dismissed. Plaintiffs, as the party invoking federal jurisdiction, bear the burden of proving jurisdictional elements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Given the factual record before the court, this motion is not limited to a facial challenge to the sufficiency of the Complaint. A Rule 12(b)(1) motion can challenge the substance of a complaint's jurisdictional allegations in spite of its formal sufficiency by relying on affidavits or any other evidence properly before the court. *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1499 (10th Cir. 1995). It then becomes necessary for the party opposing the motion to present affidavit or other evidence necessary to satisfy its burden of establishing that the court has jurisdiction. *Id.* The court is then permitted to consider and weigh the sufficiency of these materials in the context of a Rule 12 motion:

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[1] Recreationists did not formally move on the Seventh Cause of Action because it was not clear, at the time the motion to dismiss was filed, that the Seventh Cause of Action was going to be relied upon as a basis for injunctive relief. However, Recreationists discussed why the Seventh Cause of Action should be dismissed in its final memorandum, and in arguing for injunctive relief and against dismissal, Plaintiffs have addressed this issue. Thus, court will consider the merits of the Seventh Cause of Action.

> When, as here, a party attacks the factual basis for subject matter jurisdiction, the court may not presume the truthfulness of the factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts. Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment in such circumstances.

SK Finance SA v. La Plata County, 126 F.3d 1272, 1275 (10th Cir. 1997) (citations omitted).

Judicial review of agency activities is typically limited to "final agency action for which there is no other adequate remedy in a court. . . . " 5 U.S.C. § 704. Plaintiffs' claims are all brought under section 706(1) of the Administrative Procedure Act, which permits a court to compel agency action unlawfully withheld or unreasonably delayed. This type of failure-to-act claim is a very narrow exception to the APA's limitation of judicial review of final agency action. The exception has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies. This type of injunctive relief sought by Plaintiffs is essentially the equivalent of mandamus. *Mt. Emmons Mining Co. v. Babbitt,* 117 F.3d 1167, 1170 (10th Cir. 1997); *R.T. Vanderbilt Co. v. Babbitt,* 113 F.3d 1061, 1065 (9th Cir. 1997). Mandamus relief is proper "only where the functions constitute clearly defined, peremptory ministerial duties of a government official owed to a complainant." *Ortiz v. United States,* 661 F.2d 826, 831 (10th Cir. 1981). Mandamus is an appropriate remedy only if the plaintiff is owed a "clear nondiscretionary duty." *Marquez-Ramos v. Reno,* 69 F.3d 477, 478-79 (10th Cir. 1995) (stating that "[t]he importance of the term 'nondiscretionary' cannot be overstated – the judiciary cannot infringe on decision-making left to the Executive branch's prerogative.").

Claims that agency action is insufficient or inadequate do not fall within the scope of permissible judicial review under APA § 706(1).

Indeed, in assessing whether agency action is unreasonably delayed[2] and thus reviewable under 706(1), "courts have permitted jurisdiction under the limited exception to the finality doctrine [provided by 5 U.S.C. 706(1)] only where there is a genuine failure to act." *Ecology Center, Inc. v. United States Forest Serv.,* 192 F.3d 922, 926 (9th Cir. 1999). Thus, Plaintiffs cannot "evade the finality requirement with complaints about the sufficiency of agency action dressed up as an agency's failure to act." *Id.* (quotations and citations omitted). A justiciable "failure to act" claim requires "agency recalcitrance . . . in the face of a clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility . . . " *ONRC Action v. BLM,* 150 F.3d 1132, 1137 (9th Cir. 1998).

Judicial deference to agency discretion is particularly appropriate when decisions are based on the agency's special expertise and professional judgment, and "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court

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[2] The Tenth Circuit has stated that, under section 706(1), "the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action." *Forrest* [sic] *Guardians v. Babbitt,* 174 F.3d 1178, 1190 (10th Cir. 1999). In the instant case, there are no "date-certain deadlines" by which BLM's ORV management must operate. Thus, Plaintiffs' claims represent a 706(1) challenge of "unreasonably delayed" agency action, although the court's conclusion in this case would remain the same under either label.

might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council, Inc.*, 490 U.S. 360, 378 (1989). Similarly, in matters involving "primarily issues of fact," the analysis of which "requires a high level of technical expertise," courts are to defer to "the informed discretion of the responsible federal agencies." *Id.* at 376-77 (citations and quotations omitted).

A. WILDERNESS STUDY AREAS

Plaintiffs argue that the BLM has violated Section 603 of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1782(c), by permitting ORVs to impair the wilderness qualities of the following wilderness study areas ("WSAs"); Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. They also argue that BLM has violated 43 C.F.R. § 1610.5-3 by failing to consistently implement the terms of its land use management plans regarding existing WSAs and the Factory Butte Special Monitoring Area. Finally, they argue that BLM has failed to comply with the Executive Orders and regulations governing the management of ORVs on BLM lands by permitting ORV use on broad tracts of BLM lands without an application of the minimization criteria contained in these documents.

Plaintiffs argue that they are likely to succeed on the merits and point to the fact that, since they filed this lawsuit, the BLM has voluntarily closed some WSAs initially considered by Plaintiffs in this preliminary injunction request. Plaintiffs presented evidence from Dr. Howard Wilshire, an expert on the impacts of ORVs on desert ecosystems, on the significant resource damage,

including soil erosion and compaction, and destruction of vegetation.

BLM and Recreationists, on the other hand, argue that the court lacks jurisdiction over Plaintiffs' claims.[3] They claim that Plaintiffs' claims are not failure to act claims, but rather, claims about the sufficiency of the BLM's actions.

1. FLPMA's Non-Impairment Standard

FLPMA established a fifteen year review process, beginning in 1976, for the BLM to review and recommend lands for wilderness designation. *See* 43 U.S.C. § 1782(a). In 1980, the BLM identified approximately 2.5 million acres of its lands in Utah as wilderness study areas. *Utah v. Babbitt,* 137 F.3d 1193, 1198 (10th Cir. 1998). In 1991, the Secretary of Interior recommended that approximately 1.9 million acres of those lands become designated wilderness, and President Bush forwarded that recommendation to Congress. *Id.* at 1199. Congress, however, has not acted on BLM's recommendation, and thus the 3.2 million acres of WSAs remain under consideration for entry into the National Wilderness Preservation System, and are

[3] Although the BLM has consistently argued that Plaintiffs' claims are really complaints about the sufficiency of the agency action dressed up as an agency's failure to act, and as such, are not justiciable under APA § 706(1), it did not join in Recreationists' motion to dismiss. The BLM's arguments are taken from its briefs opposing Plaintiffs' motion for a preliminary injunction and Plaintiffs' post-hearing briefing. The court has focused on BLM's arguments but notes that Recreationists' arguments are substantially the same.

managed pursuant to Section 603(c) of FLPMA, 43 U.S.C. § 1782(c).

Congress has provided a standard for management of WSAs:

> During the period of review of such areas [WSAs] and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such area for preservation as wilderness.

43 U.S.C. § 1782(c). To implement the nonimpairment standard, the BLM promulgated the Interim Management Policy and Guidelines for Lands Under Wilderness Review, known as the "IMP." (The most current version of the IMP is included in Plaintiffs' Exhibit Vol. I, at Tab 8.) The BLM contends that, while it is under a mandatory statutory duty to manage lands "in a manner so as not to impair the suitability of such acres for preservation as wilderness," what this means and how it is to be carried out is far from clear, as demonstrated by BLM's subsequent development of a 49-page IMP to interpret the meaning of Congress' mandate. IMP at 3 ("To determine what is permissible under the general 'nonimpairment' standard, we must examine what Congress meant by *impairment* of an area's *suitability for preservation of wilderness.*").

Under the IMP, the BLM has a responsibility to ensure that "the existing wilderness values of *all* WSAs . . . are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress' prerogative to either designate a WSA as wilderness or release it for other uses." IMP at 4. Under the

IMP, motor vehicle travel "may only be allowed on existing ways and within 'open' areas that were designated prior to the passage of FLPMA . . . " *Id.* at 15-16. Open areas can also be designated in sand dunes. *Id.* at 47. Other than in permitted open areas, however, "cross-country vehicle use off boundary roads and existing ways" is prohibited. *Id.*

While the IMP's policy is to "take all actions necessary to ensure full compliance with the IMP," *id.* at 8, it also recognizes the reality that unauthorized incursions in the WSAs cannot always be prevented. For example, the agency is to make "every effort . . . to obtain voluntary compliance," but also to take "additional appropriate action" in the event voluntary efforts fail." *Id.* at 8. The IMP's policy is that BLM state directors "assure a level of monitoring and surveillance of each WSA adequate to prevent, detect, and mitigate unauthorized activities" and "attempt to immediately reclaim the impacts caused by any authorized action. . . . " *Id.* Responsible recreational use of WSAs is to be encouraged through promotion of "leave no Trace" and "Treat Lightly" programs. *Id.* at 45. Allowable recreational uses are also to be monitored to ensure that impairment of "wilderness suitability" does not occur (e.g., from "erosion caused by increased vehicle travel within a WSA"); "if necessary" to prevent such impairment, the BLM will "adjust the time, location, or quantity of use or prohibit that use in the impacted area." *Id.* What the IMP demonstrates is that, while there is a "nonimpairment" mandate, there are management options and levels of response that can be taken to deal with impairment problems, and the choice of response that should be made if impairment occurs is not "clear and certain . . . ministerial and so plainly prescribed as to be free from doubt."

The BLM points out that it is well aware that ORV-caused damage is resulting from cross-country travel in these WSAs, but argues that it does not "permit" such travel, and it is addressing the complicated issue of controlling the problems posed by ORV use. It also argues that "closure" of existing ways is neither required by the IMP, nor is it necessarily the solution to the existing problems. In sum, the BLM argues that Plaintiffs are not asserting a genuine failure-to-act claim, but complaints about the sufficiency of the agency action.

After listening to the testimony during a two-day hearing on Plaintiffs' motion for a temporary restraining order and during a four-day preliminary injunction hearing, and carefully reviewing the briefs filed by the parties, along with the affidavits and other exhibits, the court concludes that Plaintiffs have not demonstrated that BLM has abdicated its statutory responsibility. Plaintiffs' claim appears to be a complaint about the sufficiency of BLM's action, rather than a genuine failure to act. While Plaintiffs have presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use, BLM has also presented significant evidence about the steps it is and has been taking to prevent such impairment.

It is clear that the decision to close or leave open an existing way in a WSA is far from clear and certain, ministerial, and so plainly prescribed as to be free from doubt. Whether or not "impairment" is occurring constitutes precisely the type of administrative determination that is entitled to considerable weight. *See ONRC Action,* 150 F.3d at 1139. It is also clear that BLM is aware of the impairment caused by ORV use, and it is, at least, attempting to perform a complex balancing of many factors

that bear on this issue. For example, BLM faces constraints on personnel and other resources, and it must consider the size and number of WSAs and other areas that must be managed, the increasing recreational pressure from ORV users, the assertion of RS 2477 rights by the state and counties, the practicality, feasibility, and effectiveness of various restrictions, and other factors. The representatives from various BLM Field Offices testified about the management efforts in their respective areas, and some discussed efforts at coordinating and collaborating with the state, counties, and local ORV user groups to gain support for cooperation and volunteer actions that would protect WSA values and develop user ethics that respect the land, natural resource and wilderness values. In addition, the BLM must consider that a closure of such routes could result in a backlash by some users who would purposely violate the closure and might significantly reduce or eliminate opportunities for cooperative volunteer projects such as rehabilitation, signing, barricading, and monitoring. These are risks that must be considered, by those with expertise and professional judgment, in arriving at the most effective solution to the problems.

Even if the court were to agree with Plaintiffs that the pace and nature of BLM's actions were inadequate, Plaintiffs still would not have satisfied their onerous burden of demonstrating that the BLM has failed to act. It appears that BLM has taken various actions, many of them recently – perhaps due, at least in part, to this lawsuit – but, steps have been taken nonetheless. Even Plaintiffs stated during their closing arguments, that the BLM has taken "half steps." Thus, this claim must be dismissed.

2. Land Use Management Plans

Under 43 C.F.R. § 1610.5-3(a), "[a]ll future management authorizations and actions . . . shall conform to the approved [management] plan. Plaintiffs claim that the BLM has failed to comply with its Management Framework Plans, Resource Management Plans, and the pertinent amendments to those documents. They contend that the BLM has failed to protect the four WSAs at issue here from impairment, as required by the Resource Management Plans governing them, and that BLM has failed to implement the protections to which it committed in the planning documents for the Henry Mountains Resource Area and the San Rafael Resource Areas.

Plaintiffs' first argument is essentially the same as the FLPMA § 603 claim discussed above, and thus, it will not be discussed again here. Regarding their claim that the BLM has failed to implement portions of the RMPs for the San Rafael and Henry Mountain Resource Areas, Plaintiffs' claim is, again, a claim regarding the sufficiency of BLM's actions, rather than a failure to carry out a clear, ministerial duty.

The regulation, 43 C.F.R. § 1610.5-3(a) states that "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan." This language appears, on its face, to be limited only to affirmative projects either approved or undertaken after the RMP is in place; it does not require that further planning activities contemplated by the plan actually take place. Plaintiffs have not identified some site-specific action taken by the BLM that does not conform to the plan; rather, they claim that further planning activities

specified in the RMPs did not occur. This claim, then, does not amount to a genuine 706(1) claim. *See e.g., Ecology Center v. U.S. Forest Service,* 192 F.3d at 926; *ONRC Action,* 150 F.3d at 1139 (explicitly rejecting 43 C.F.R. § 1610.5 as a possible basis for APA § 706(1) jurisdiction). Even the consistency requirement of § 302(a) of FLPMA ("The Secretary shall manage the public lands . . . in accordance with the land use plans") does not assist Plaintiffs here. While the BLM's actions have not been carried out to the letter, there has not been a complete failure to perform a legally required duty that would trigger a review under § 706(1).

3. Executive Orders and Regulations

Executive Order 11644 provides that ORV use shall only be permitted on public lands in accordance with the following criteria:

> (a) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability.
>
> (b) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats. Special attention will be given to protect endangered or threatened species and their habitats.
>
> (c) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

37 Fed. Reg. 2877 (1972).[4] The BLM's ORV designation criteria regulations incorporate the terms of Executive Order 11644 almost verbatim. *See* 43 C.F.R. 8341.2

BLM argues that Plaintiffs are attempting to challenge the Resource Management Plans themselves, which are final decisions challengeable only under APA § 704, which Plaintiffs have never pleaded as a basis for jurisdiction, and they have not exhausted their administrative remedies in any event. In addition, BLM argues that Plaintiffs' argument, that illegal creation of trails in areas classified as "limited" in RMPs is a *per se* violation of the minimization criteria, is not correct. The BLM argues that the simple fact that illegal use is being made of some BLM lands does not amount to the affirmative creation of trails by BLM in violation of the minimization criteria, and Plaintiffs present no legal basis for imputing such illegal acts to the agency.

In addition, while Plaintiffs also argue that areas in the Parunuweap and Moquith Mountain WSAs are classified as "open" to cross-country ORV use, with user-creation of trails taking place, BLM contends that, to the extent that this is a claim of inadequate law enforcement, such a claim is not reviewable under the APA. *Heckler v. Chaney,* 470 U.S. 821, 832 (1985). BLM further argues and the court agrees that, to the extent Plaintiffs are contending that "open" designations for these areas violate the IMP, they are wrong. The only open areas on the Moquith WSA

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[4] Executive Order 11644 was amended by Executive Order 11989, which gave the BLM the authority to close areas of the public lands that were suffering "considerable adverse affects" from ORV use. 42 Fed. Reg. 26959 (1977).

are the dunes areas, which have been the subject of extensive analysis and management planning by BLM to comply with the IMP standard, which permits open areas in dunes. While certain areas of the Parunuweap WSA fall within "open" land designations under the Vermillion Management Framework Plan, testimony demonstrated that this Plan was developed and implemented before the Parunuweap WSA was designated and that management of the WSA itself has been under the IMP and limited to existing ways.

Accordingly, this claim cannot survives [sic] under § 706(1), and it must be dismissed.

B. SECTION 202 AREAS

Plaintiffs seek injunctive relief pertaining to specific areas not currently designated as WSAs, but which were identified by the BLM in its 1999 Wilderness Inventory process as having wilderness qualities.[5] The BLM is

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[5] Prior to the preliminary injunction hearing, Plaintiffs sought to dismiss their Ninth Cause of Action without prejudice, as discussed below. BLM and Recreationists opposed that motion, arguing that it should be dismissed with prejudice. The court notified the parties that, in any event, the Ninth Cause of Action would be dismissed, and whether the dismissal would be with or without prejudice would be determined at a later date. In any event, that claim would not be at issue during the preliminary injunction hearing. The Ninth Cause of Action was premised on 41 C.F.R. § 1506.1(a) and targeted those areas now being considered by the BLM for possible designation as Wilderness Study Areas under FLPMA. These areas included lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa. With the dismissal of the Ninth Cause of Action, the question of whether these areas must be managed to protect wilderness values

(Continued on following page)

currently reviewing these areas under its planning authority to determine whether to give them WSA status. Referred to as "§ 202 areas," they include: the land adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa.

First, regarding the Factory Butte, North Caineville Reef, and Wildhorse Mesa areas, Plaintiffs contend that BLM has violated 43 C.F.R. § 1610.5-3(a) by failing to conform its actions to the terms of the Henry Mountains ORV Plan, the Henry Mountains Resource Area Management Framework Plan, and the San Rafael Resource

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under the non-impairment standard of FLPMA Section 603, 43 U.S.C. § 1782(c) was no longer at issue in this case.

During the week prior to the preliminary injunction hearing, Plaintiffs filed a Supplemental Memorandum Addressing Effect of Dismissal of Ninth Cause of Action. In that memorandum, Plaintiffs explained that it was still entitled to injunctive relief closing significant portions of these areas to further ORV use because they had alleged three claims that were not premised on the non-impairment mandate or the fact that these areas were being considered for WSA status. At the preliminary injunction hearing, on August 28, 2000, the BLM and Recreationists objected to Plaintiffs' attempt to keep alive issues pertaining to the § 202 areas, because they had believed that, with the dismissal of the Ninth Cause of Action, these areas would not be at issue during the preliminary injunction hearing because no other theories pertaining to these areas had been raised in Plaintiffs' briefs. Recreationists filed a motion in limine to exclude these theories. The court, however, denied the motion and allowed Plaintiffs to proceed with their theories pertaining to the § 202 Areas. The court stated that, after further briefing from Plaintiffs after the hearing, the other parties would have an opportunity to respond to Plaintiffs' briefing and that a subsequent evidentiary hearing would be held, if necessary. Accordingly, after the hearing, Plaintiffs submitted further briefing on its Seventh Cause of Action-the Supplemental NEPA Claim-and BLM, Recreationists, and the State then filed responsive briefs.

Management Plan. They claim that the BLM has failed to perform the monitoring required by the Henry Mountains plans and has failed to designate trails in "limited" areas in the San Rafael Resource Area, with the result that these areas are *de facto* open to cross-country ORV use.

Second, Plaintiffs argue that, in all of the non-WSA areas at issue, they have presented evidence that new trails are being created on the ground in violation of the public participation provisions of the Executive Orders and the BLM regulations. Thus, they are entitled to injunctive relief in light of the new trails that are being established on these areas.

Finally, Plaintiffs argue that, with regard to these areas, the BLM has violated 40 C.F.R. § 1502.9(c)(1) by failing to supplement existing NEPA analysis and documents to reflect current ORV user numbers, ORV use patterns, damaging ORV impacts, and the creation of new user-crated [sic] ORV trails. NEPA requires such supplementation if "there are new circumstances or information relevant to the environmental concerns and bearing on the proposed actions or its impacts." 40 C.F.R. § 1502.9(c)(1).

Plaintiffs argue that the land use plans encompassing the non-WSA areas at issue (i.e., the Vermillion Management Framework Plan, the Henry Mountain Management Framework Plan and Off-Road Vehicle Implementation Plan, and the San Juan, San Rafael, and Grand Resource Management Plans) all presuppose two things: (1) that ORV user figures would remain static, and (2) that additional NEPA planning, along with other implementation measures (i.e., monitoring, signing, trail maps, etc.) were prerequisites to comply with the terms of the plans themselves. Plaintiffs claim that they have presented evidence

that, although neither of these suppositions have occurred, the BLM has failed to engage in additional NEPA analysis. They claim that ORV user figures have skyrocketed in the past ten years, when the most recent NEPA land use plans at issue were completed, and yet the Kanab, Monticello, Price, Moab, and Henry Mountains Field Station offices have not updated their NEPA analysis.

Again, BLM and Recreationists argue that an agency decision to amend or revise land management plans or to perform supplemental NEPA analysis is not a clearly defined, ministerial duties [sic], but rather, requires considerable discretion and judgment, as does the timing and pace of such process once it is undertaken.

Plaintiffs' claims regarding the § 202 areas suffer the same deficiency as their claims regarding the WSAs. The regulations upon which Plaintiffs rely reek of discretion. This court cannot conclude, after listening to the testimony and considering the parties' post-hearing briefs regarding Plaintiffs' Seventh Cause of Action – particularly the Declaration of Douglas M. Koza, the Deputy State Director, Natural Resources for the Utah State BLM, that the BLM has abdicated a mandatory, nondiscretionary duty.

Mr. Koza has provided a detailed account of the BLM's extensive planning workload, including the actions that have been taken in the recent past, current actions, and actions that are planned for the future. In addition, the BLM's planning efforts are tied to complex budget and other resource variables that require setting priorities for major planning efforts on both a national and state level. This means that the agency is unable to address every perceived need at once and that priorities must be set

based on management judgment as to how such needs can be best met within the context of all the other demands for funding and resources that are inherent in the management of 23 million acres of public lands in Utah. The BLM has recognized that ORV use on public lands generally has increased over the past few years and is taking steps to deal with the implications and effects.

Plaintiffs claim that BLM has failed to take the required "hard look" at the question of whether increased ORV activity amounts to new information or new circumstances that warrant supplemental NEPA analysis, and claim that the inescapable conclusion must be that the new circumstances unanticipated by existing NEPA documents, skyrocketing ORV use, and environmental impacts *require* supplemental NEPA. However, that conclusion is not justified on the evidence before the court. The court cannot state that the agency "has a clear duty to act under NEPA or FLPMA." *See ONRC Action,* 150 F.3d at 1137. Indeed, the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to "defer to the informed discretion of the responsible federal agencies." *Marsh,* 490 U.S. at 377 (quotation and citation omitted).

This court "is hesitant to upset an agency's priorities by ordering it to expedite one specific action and thus give it precedence over others." *Sierra Club v. Thomas,* 828 F.2d 783, 797 (D.C. Cir. 1987) (finding, in 706(1) case, that "a court is generally ill-suited to review the order in which an agency conducts its business.") While the court might agree with Plaintiffs that too little is done too slowly, the court cannot conclude that BLM has abdicated its statutory responsibility for management.

III. MOTION TO DISMISS NINTH CAUSE OF ACTION

Plaintiffs have moved to dismiss their Ninth Cause of Action without prejudice. Recreationists, in the motion to dismiss discussed above, argued that the Ninth Cause of Action should be dismissed with prejudice. BLM originally moved to dismiss the Ninth Cause of Action with prejudice, but subsequently stated that, "at the time defendants filed their motion, it appeared that dismissal was warranted based only on the allegations of the pleadings and at this point, the issue appears more complicated. Thus, with the issue effectively gone from this case, in any event, and without waiving the merits of their motion to dismiss with prejudice, defendants advise the Court that they do not oppose the dismissal, without prejudice, of plaintiffs' Ninth Cause of Action." United States' Response to Plaintiffs' Supplemental Briefing Re: Seventh Cause of Action at 2. Because the BLM does not oppose it, the court grants Plaintiffs' motion to dismiss the Ninth Cause of Action without prejudice.

IV. CONCLUSION

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that

(1) Recreationists' Motion to Dismiss (docket # 123) is GRANTED, and Plaintiffs' First, Fifth, Six, and Seventh claims, to the extent they pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing, are DISMISSED with prejudice. The Ninth Cause of Action, however, is not dismissed based upon this motion.

(2) Plaintiffs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action (docket # 111) is GRANTED, and the Ninth Cause of Action in the Second Amended Complaint is DISMISSED without prejudice;

(3) Plaintiffs' Motion for a Preliminary Injunction (docket # 53) is DENIED AS MOOT;

(4) BLMs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action with Prejudice (docket # 117) is MOOT, as BLM has now stated that it does not oppose dismissal without prejudice.

DATED this 22st [sic] day of December, 2000.

BY THE COURT:

/s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, et al., Plaintiffs-Appellants, v. GALE NORTON, Secretary, United States Department of the Interior, et al., Defendants-Appellees, STATE OF UTAH, et al., Defendants-Intervenors-Appellees.	No. 01-4009 (D.C. No. 2:99-CV-852-K)

ORDER

Filed February 18, 2003

Before **EBEL**, **McKAY** and **LUCERO**, Circuit Judges.

Appellees' two petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, the petitions are also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ K. Fabrizio
Deputy Clerk

(2) (2)

Nos. 02-1703 and 03-101

FILED
SEP 24 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

GAIL NORTON, Secretary of the Interior, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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94 pp

QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the Bureau of Land Management (BLM) has not been ordered to take any action, and when further proceedings may moot or narrow petitioners' concerns.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM had failed to comply with its mandatory duty to "manage the public lands . . . in accordance with . . . land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

4. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to decide whether BLM violated the National Environmental Policy Act by failing to consider significant increases in off-road vehicle use on specified BLM lands in Utah.

PARTIES TO THE PROCEEDINGS

The following are parties to this proceeding:

1. Petitioners:

Gale Norton, Secretary of the Interior
Kathleen Clarke, Director of the Bureau of Land Management
Bureau of Land Management
Utah Shared Access Alliance
The Blue Ribbon Coalition, Inc.
Elite Motorcycle Tours
Anthony Chatterly

2. Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
Sierra Club
Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
Friends of the Abajos
State of Utah
San Juan County, Utah
Emery County, Utah
Wayne County, Utah
Kane County, Utah
Utah School and Institutional Trust Lands Administration

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, American Lands Alliance, and Friends of the Abajos have no parent companies and issue no corporate stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. STATUTORY BACKGROUND 3

1. FLPMA'S NONIMPAIRMENT REQUIREMENT 3

2. FLPMA LAND USE PLANNING AND THE ACCOMPANYING ENVIRONMENTAL REVIEW PROCESS 4

B. THE PROCEEDINGS BELOW 5

REASONS FOR DENYING THE PETITION 10

I. THE PROCEDURAL POSTURE OF THIS CASE RENDERS IT AN INAPPROPRIATE CANDIDATE FOR SUPREME COURT REVIEW 10

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS 13

III. THE ISSUES THAT BLM RAISES IN ITS PETITION REVIEW ARE NOT PRESENTED IN THIS CASE. 17

IV. THE TENTH CIRCUIT'S DECISION TO ALLOW SUWA'S UNEXCEPTIONAL APA CLAIMS TO PROCEED IS CONSISTENT WITH THE TREATMENT OF SUCH CLAIMS BY OTHER COURTS..... 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adams v. Richardson,
480 F.2d 1159 (D.C. Cir. 1973) 23

American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.,
148 U.S. 372 (1893) 11

Bennett v. Spear, 520 U.S. 154 (1997) 21

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327(1967) 10

Center for Biological Diversity v. Veneman,
335 F.3d 849 (9th Cir. 2003) 16, 23

Darst-Webbe Tenant Ass'n Board v. St. Louis Housing Authority, 339 F.3d 702 (8th Cir. 2003) 23

Davis Associates, Inc. v. Secretary, Department of Housing & Urban Development,
498 F.2d 385 (1st Cir. 1974) 25

Ecology Center Inc. v. United States Forest Service,
192 F.3d 922 (9th Cir. 1999) 16

Edgerton v. Kingsland,
168 F.2d 128 (D.C. Cir. 1947) 25

Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984) 25

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 23

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,
240 U.S. 251 (1916) 10

Huck v. BLM, IBLA No. 2003-169 19

Hughes River Watershed Conservancy v. Glickman,
81 F.3d 437 (4th Cir. 1996) 5, 20

Idaho Watersheds Project v. Hahn,
307 F.3d 815 (9th Cir. 2002) 25

Iowa ex rel. Miller v. Block,
771 F.2d 347 (8th Cir. 1985) 23

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 13, 14, 15, 16

Marquez-Ramos v. Reno,
69 F.3d 477 (10th Cir. 1995) 25

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 5, 20

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) 18

Montana Wilderness Ass'n v. United States Forest Service, 314 F.3d 1146 (9th Cir. 2003) 16, 23, 24

NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 22

Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) 12

Norton v. BLM, IBLA No. 2003-171 19

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) 16, 18, 19

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration,
740 F.2d 21 (D.C. Cir. 1984) 23

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) 4

Sierra Club v. Peterson,
228 F.3d 559 (5th Cir. 2000) 15, 16

Southeastern Utah OHV Club v. BLM,
IBLA No. 2003-172 19

South Trenton Residents Against 29 v. Federal Highway Admin., 176 F.3d 658 20

Telepak v. BLM, IBLA No. 2003-170 19

Village of Grand View v. Skinner,
947 F.2d 651, 657 (2d Cir. 1991) 20

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 10

Wilbur v. United States ex rel. Kadrie,
281 U.S. 206 (1930) 25

STATUTES, REGULATIONS, AND RULES

5 U.S.C. § 551(13) 22
5 U.S.C. § 553(e) 22
5 U.S.C. § 706 7
5 U.S.C. § 706(1) ..... *passim*
5 U.S.C. § 706(2)(A) 17
16 U.S.C. § 1131(c) 3
16 U.S.C. § 1132(b) 3
42 U.S.C. § 4332(2)(C) 5
43 U.S.C. §§ 1701-1784 3
43 U.S.C. § 1712(f) 4
43 U.S.C. § 1732(a) 4
43 U.S.C. § 1782(a) 3
43 U.S.C. § 1782(c) 3-4, 6, 18, 21
40 C.F.R. §§ 1500-1508 5
40 C.F.R. § 1502.9(c)(1)(ii) 5
43 C.F.R. § 1610.2 4
43 C.F.R. § 1610.5-3(a) 5, 20
FED. R. CIV. P. 54(b) 8

MISCELLANEOUS

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* (8th ed. 2002) 11
Attorney General's Manual on the Administrative Procedure Act (1947) 21-22
http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm 19
http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm 6

INTRODUCTION

Petitioners in this case sought the dismissal under Rule 12(b)(1) of Respondents' (collectively "SUWA's") claims that the Bureau of Land Management (BLM) violated three of the agency's mandatory statutory duties: (1) the duty under the Federal Land Policy and Management Act (FLPMA) to prevent the impairment of wilderness study areas (WSAs), 43 U.S.C. § 1782(c); (2) the duty under FLPMA to "manage the public lands . . . in accordance with . . . land use plans," 43 U.S.C. § 1732(a); and (3) the duty under the National Environmental Policy Act (NEPA) to determine whether new information triggers the agency's duty to prepare supplemental environmental analyses. In the course of the proceedings below, BLM admitted that: (1) the agency *was* allowing the four WSAs at issue to be impaired by off-road vehicle (ORV) use; (2) the agency had *not* taken the particular actions set out in the two relevant land use plans; and (3) the agency had *never* considered whether the explosive increase in ORV use required it to prepare supplemental NEPA analyses for the five BLM areas identified by SUWA. BLM App. at 25a-26a, 32a-33a; App. at 58-59.[1] Despite these admissions and the overwhelming evidence that BLM had failed to satisfy these statutory mandates, the agency argues that the district court did not even have authority to consider the merits of SUWA's claims. The Tenth Circuit correctly rejected petitioners' arguments and further review by this Court is unwarranted.

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[1] This brief refers to the Petition for a Writ of Certiorari filed by Gale Norton *et al.* as "BLM Pet." and its appendix as "BLM App." The Petition for a Writ of Certiorari filed by the Utah Shared Access Alliance *et al.* (the "ORV Intervenors") is cited as "ORV Pet." The appendix to the instant opposition to the petitions is cited to as "App."

First, the procedural posture of this appeal renders it an unfit vehicle for Supreme Court review. Because this is an interlocutory appeal of a jurisdictional ruling concerning only a subset of SUWA's claims, the concerns raised in the petitions may be clarified or even mooted through further proceedings in the lower courts. This possibility is particularly acute here because, as often occurs when cases are still at an early pleading stage, SUWA's allegations and asserted bases for relief have evolved since the Tenth Circuit issued its decision. In addition, BLM has itself asserted in the courts below that one of the primary claims at issue in its petition is now moot.

Second, the Tenth Circuit's decision does not conflict with any opinion of this Court or of any court of appeals. BLM's effort to manufacture such a conflict mischaracterizes SUWA's claims and the proceedings below. BLM accuses SUWA of mounting a "wholesale" or "programmatic challenge" to BLM's failure to comply with "general statutory standards." BLM Pet. at 9, 12. This is incorrect. SUWA challenged BLM's failure to comply with three discrete and well-defined statutory mandates based on equally discrete facts concerning ORV use on specific BLM lands. Nor did the Tenth Circuit sanction a "programmatic challenge," as BLM claims. The court simply held that the district court had authority under 5 U.S.C. § 706(1) to consider whether the agency had violated specific statutory requirements.

Third, the issues raised by BLM concerning judicial review are not squarely presented in this case. Because of the factual and legal specificity of SUWA's claims, this case does not offer the Court occasion to decide whether courts may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards." Nor does this case present the question of whether the APA empowers a court to compel non-final agency action because the actions that SUWA seeks to compel are, in fact, "final" under the APA.

Fourth, SUWA's unexceptional APA claims are of the sort that have been addressed routinely by courts in the past. The Tenth Circuit's limited ruling allowing this case to proceed broke no new legal ground by holding that the district court had authority to consider whether BLM had failed to comply with clear statutory mandates.

For all of these reasons, the petitions should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. FLPMA's Nonimpairment Requirement

In 1976, Congress passed FLPMA, 43 U.S.C. §§ 1701-1784, which governs the management of BLM lands. Among many other things, FLPMA required BLM to review and recommend lands for inclusion within the National Wilderness Preservation System. 43 U.S.C. § 1782(a). In order to be eligible for wilderness designation, an area must generally be at least 5,000 acres in size and "generally appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C. § 1131(c).

By 1984, BLM had concluded that 3.2 million acres of its lands in Utah qualified as potential wilderness. These areas are called "wilderness study areas," or "WSAs." Because Congress – the sole body legally capable of designating wilderness areas, 16 U.S.C. § 1132(b) – has not yet designated these areas as wilderness or determined that it will not do so, these 3.2 million acres remain classified as WSAs and must be managed pursuant to § 603(c) of FLPMA, 43 U.S.C. § 1782(c). That section mandates that:

> During the period of review of such areas [*i.e.*, WSAs] and until Congress has determined otherwise, the Secretary *shall continue to manage such lands* according to his authority under this Act

> and other applicable law in a manner *so as not to impair the suitability of such areas for preservation as wilderness*.

43 U.S.C. § 1782(c) (emphases added). Through this requirement – which is referred to colloquially as the "nonimpairment mandate" – Congress has reserved to itself the final say as to whether WSAs ultimately become designated wilderness.

BLM interprets FLPMA's nonimpairment requirement through its Interim Management Policy (IMP). *See Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988), *overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In the IMP, BLM determined that WSAs are "impaired" in violation of FLPMA whenever ORV riders drive off-road because "the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation." BLM App. at 15a n.7.

2. FLPMA Land Use Planning And The Accompanying Environmental Review Process

The Utah BLM is divided into field offices for purposes of management and administration. FLPMA requires each BLM field office to develop a land use plan for its area pursuant to a process that affords extensive opportunities for public involvement and environmental review under NEPA. *See* 43 U.S.C. § 1712(f) (public participation requirement); 43 C.F.R. § 1610.2 (same). Land use plans specify which activities – from mining to camping – will be permitted, and the location and conditions under which they will be allowed. 43 U.S.C. § 1732(a).

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). This mandatory language is echoed in FLPMA's

implementing regulations, which declare that "[a]ll future resource management authorizations and actions . . . *shall conform to the approved plan.*" 43 C.F.R. § 1610.5-3(a) (emphasis added).

Prior to finalizing a land use plan, BLM must comply with the public participation and environmental review requirements of NEPA, which require a federal agency to prepare an environmental impact statement (EIS) for major federal actions, such as land use plans, that may significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500-1508 (NEPA regulations). BLM's NEPA duties do not end once the agency completes its initial EIS for a FLPMA land use plan. NEPA's regulations require federal agencies to "prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9(c)(1)(ii). *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. The Proceedings Below

ORVs pose a significant threat to the ecological health of the fragile desert lands managed by BLM in Utah and have eroded the soils, trampled vegetation, destroyed cultural relics, harmed water quality, harassed wildlife, and destroyed wildlife habitat. App. at 8-12 (second amended complaint).

Although BLM was required by NEPA to consider the environmental impacts of ORV use when it issued its Utah land use plans and decided where and how ORVs could be used, many of those plans are decades old and were prepared prior to the recent dramatic increase in ORV use in Utah. As a result, BLM's environmental analyses for many of its land use plans in Utah assumed far lower levels of ORV use – and

far less environmental impact – than actually is occurring today.

Even under the less pervasive ORV use of the past, several plans recognized and sought to address the ecological damage done by unrestricted ORV use. Two instances are relevant to these proceedings. The first is the 1991 San Rafael Resource Management Plan, which limited ORV use to designated roads and trails. However, the 1991 Plan left the actual designation of particular routes to a separate San Rafael Route Designation Plan, *which the agency committed to complete by 1992*. That Designation Plan still had not been completed when SUWA filed this case in 1999.

The second relevant land use plan commitment is set out in the 1990 Henry Mountains ORV Implementation Plan. Because BLM was particularly concerned with the damaging impacts of ORVs in the Factory Butte area, the 1990 Plan obligated BLM to conduct an intensive ORV monitoring program to determine whether ORV use should be restricted. BLM App. at 25a. BLM admitted that it had not conducted the required monitoring when SUWA filed this action a decade later. *Id.* at 25a-26a.[2]

Prior to filing this lawsuit, SUWA met with and wrote to BLM personnel to demand that the agency comply with particular legal duties concerning ORV use. SUWA specifically: (1) detailed the environmental damage being caused by ORVs in WSAs; (2) noted that this damage constituted "impairment" under 43 U.S.C. § 1782(c); (3) asked that specific WSAs be closed to ORV travel in order to prevent continued degradation and impairment; and (4)

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[2] Five months after SUWA filed this lawsuit, BLM initiated the long-promised monitoring program at Factory Butte. In addition, on February 3, 2003, BLM released its decade-overdue San Rafael Route Designation Plan. *http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm* (BLM website describing decision).

urged BLM to comply with both of the specific land use plan commitments described *supra* at 6. App. at 50-57.

After failing to convince BLM to comply with its statutory duties, SUWA filed the instant action in late 1999. SUWA's second amended complaint presented ten causes of action under the APA, 5 U.S.C. § 706.[3] In 2000, SUWA moved for a preliminary injunction on four claims, three of which are relevant here: (1) that BLM had violated FLPMA's nonimpairment mandate by allowing ORVs to impair four specific WSAs; (2) that BLM had violated FLPMA's land use plan consistency requirement by failing to complete the San Rafael Route Designation Plan and by failing to conduct intensive ORV-monitoring in the Factory Butte area; and (3) that BLM had violated NEPA by failing to determine whether increases in ORV use triggered the agency's duty to supplement several particularly outdated NEPA analyses. SUWA asked the district court to issue a preliminary injunction prohibiting ORV use within the affected areas.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that the alleged impairment "is occurring in the WSAs due to ORV use." BLM App. at 65a. The court ruled, however, that it lacked jurisdiction to consider SUWA's nonimpairment claim because FLPMA leaves BLM with "management options" regarding how the mandate could be satisfied, and because the agency had taken some minimal steps towards satisfying the mandate. *Id.* at 64a, 66a. The court held that it lacked jurisdiction to consider SUWA's land use plan consistency

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[3] On July 23, 2003, SUWA filed a third amended complaint, which did not include several of SUWA's earlier claims, narrowed SUWA's surviving claims, and, unlike its earlier complaints, stated explicitly that BLM's failures were "arbitrary, capricious, and otherwise not in accordance with law." App. at 41-45 (quoting 5 U.S.C. § 706(2)(A)).

claims because, in its view: (1) the agency had taken some steps to comply with those plans; and (2) the claim concerned management actions rather than the administration of future site-specific actions. *Id.* at 67a-68a. Finally, the court believed that it lacked jurisdiction over SUWA's supplemental NEPA claim because such claims involve agency expertise and thus, in the district court's view, could not be enforced pursuant to the APA. *Id.* at 74a. Having dismissed the claims to the extent they applied to the areas addressed in SUWA's preliminary injunction motion, the court denied that motion as moot. *Id.* at 76a. On February 9, 2001, the district court issued a Rule 54(b) certification entering final judgment on the claims raised in SUWA's preliminary injunction motion. App. at 48-49.

The Tenth Circuit, in an opinion written by Judge Ebel, reversed and remanded for further proceedings on the dismissed claims. BLM App. at 1a-39a. The court stated at the outset that, under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty." *Id.* at 10a. Jurisdiction exists in this case, the court concluded, because the duties SUWA seeks to enforce, including the nonimpairment duty, are each mandatory and non-discretionary. *Id.* at 5a, 26a, 34a-35a, 38a. The court rejected BLM's claim that jurisdiction is defeated because FLPMA leaves BLM with some discretion as to how to satisfy the nonimpairment requirement. *Id.* at 12a-15a. While this discretion may go to the merits of SUWA's nonimpairment claim or the propriety of any injunctive relief, it did not deprive the court of jurisdiction. *Id.* at 14a.

The court then rejected BLM's argument that a mandatory statutory duty is unenforceable if an agency may be able to satisfy that duty through non-final action. BLM's position, the court held, "read[s] finality in an inappropriately cramped manner" by ignoring the fact that an agency's failure to carry out a mandatory statutory duty is

equivalent under the APA to a final decision declaring that it will not comply with the duty. *Id.* at 16a-18a. The court also rejected BLM's "final action" argument because: (1) it was inconsistent with case law indicating that a court may compel an agency to satisfy a duty even if the agency has discretion concerning how the duty may be satisfied; (2) it would create a "no-man's land" of judicial review where agencies could flout mandatory statutory duties; and (3) many of the steps that BLM might take to prevent impairment would be final action, including the road closures sought by SUWA in its preliminary injunction motion. *Id.* at 18a n.10.[4]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – towards someday satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate," the court explained, "it does not follow [that those steps] ... deprive[] a court of subject matter jurisdiction to determine whether it ha actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 20a.

The Tenth Circuit also reversed the district court's ruling that it was unable to review SUWA's land use plan claim. Dismissal was improper, the Tenth Circuit concluded, because "a straightforward reading of the relevant L[and] U[se] P[lans], as well as applicable statutes and regulations,

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[4] BLM states that the Tenth Circuit concluded that courts have jurisdiction over "'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Pet. at 7. This is incorrect. The Tenth Circuit's reference to "day-to-day management actions," which BLM quotes in its petition, is drawn from BLM's characterization of the issue in its own Tenth Circuit brief. BLM App. at 15a-16a. The Tenth Circuit never adopted this view of the issue.

suggests that the BLM must carry out specific activities promised in the" plans. *Id.* at 26a-27a. While "BLM can draft L[and] U[se] P[lan]s in a way that optimizes the agency's ability to respond to changing circumstances and conditions . . . , BLM cannot 'ignore the requirements of the . . . Plan'" *Id.* at 27a (quoting *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999)); *see also id.* at 29a-30a (rejecting lower court's view that BLM need only comply with its land use plans when the agency undertakes future, site-specific projects).

While Judge McKay dissented from the majority's nonimpairment and plan consistency holdings, the panel unanimously reversed the district court's dismissal of SUWA's supplemental NEPA claim. The district court, the Tenth Circuit concluded, has jurisdiction over SUWA's claim that unanticipated increases in ORV use in several areas triggered BLM's duty to determine whether the agency must prepare supplemental environmental analyses. *Id.* at 37a-39a.

REASONS FOR DENYING THE PETITION

I. The Procedural Posture Of This Case Renders It An Inappropriate Candidate For Supreme Court Review.

This Court has a long tradition of declining petitions for review in cases whose claims have not each been fully resolved by the lower courts. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id.*; *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly . . . [a]nd, except in

extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). As the Solicitor General has noted many times, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." *See, e.g.*, Cert. Op. at 6, *Tocco v. United States*, No. 02-1225 (2003); Cert. Op. at 11, *Hsia v. United States*, No. 99-680 (1999). Where further proceedings remain, issues raised in a petition for a writ of certiorari may be mooted or narrowed in the lower courts, sparing this Court from expending its resources inefficiently. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, Supreme Court Practice § 4.18 at 260 (8th ed. 2002) ("in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will generally result in the denial of certiorari").

Further proceedings in the courts below may moot or narrow petitioners' concerns in this case. While BLM raises the ominous prospect of intrusive judicial relief that would "significantly disrupt[]" the government's ability to manage the public lands, BLM Pet. at 27, no such relief has been granted in this case. Because SUWA's claims were dismissed at such an early stage, the courts below have never had the opportunity to determine whether SUWA should prevail on the merits, let alone the nature of any appropriate injunctive relief. The Tenth Circuit decided only that SUWA had a right to pursue its claims and the court was at pains to stress the "narrow" nature of its ruling and to emphasize that the merits of SUWA's claims will "need to be addressed on remand." BLM App. at 3a.

On remand, the lower courts might find that SUWA's claims fail on the merits, that equitable considerations do not justify the relief that SUWA seeks, that SUWA is entitled to such relief on wholly separate grounds, or that some other form of injunctive relief is more appropriate. A court might, for instance, order BLM to comply with the nonimpairment

mandate and carry out its land use plan commitments within a specified time and detail consequences for any failure to do so. Alternatively, a court might provide an interpretation of BLM's nonimpairment duty under FLPMA and require the agency to act in light of that interpretation.[5] Given the range of plausible outcomes, it is wholly uncertain to what extent – if any – petitioners' concerns may ultimately present themselves in this litigation. Only by denying the petitions and allowing this case to proceed in the courts below will that uncertainty be resolved.

Further militating against Supreme Court review at this point is the fact that the proceedings thus far have dealt with only a subset of SUWA's claims. *See supra* at 7. Granting the petitions for a writ of certiorari at this point could result in a piecemeal review of just the sort disfavored by this Court. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing a writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted). Furthermore, the presence of additional claims raises the possibility that SUWA may win injunctive relief pursuant to one of its as-yet-unadjudicated claims, in which case this Court's efforts would have no impact on the ground in Utah.[6]

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[5] If the court were to take this route, it would be exercising what even BLM admits is a court's legitimate ability to "require an agency to take action upon a matter, without directing how it shall act." BLM Pet. at 16 (quoting Attorney General's Manual on the Administrative Procedure Act (1947) at 108).

[6] The picture here is clouded still further by the fact that SUWA's third amended complaint altered its legal claims by alleging that BLM's inaction has been "arbitrary, capricious, or otherwise not in accordance with law." App. at 41-45 (quoting 5

A final reason for denying review, particularly over SUWA's land use plan consistency claim, is that BLM has begun to implement the provisions that underlie SUWA's claim. *Supra* at 6 n.2. BLM argued below that the agency's compliance with these long-ignored obligations moots SUWA's claim. BLM App. at 31a n.17 (Tenth Circuit acknowledging BLM's mootness argument). This Court ought not spend its scarce resources resolving claims that might be dismissed on remand as moot.

II. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Court Of Appeals.

BLM bases its petition in large part on an alleged conflict between the decision below and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). No such conflict exists.

First, *Lujan* deals exclusively with standing. This is apparent from the opening line of the *Lujan* opinion, which declares that "[i]n this case we must decide whether respondent...is a proper party to challenge actions of the Federal Government." *Lujan*, 497 U.S. at 875. The opinion never cites 5 U.S.C. § 706(1), the section at issue here, and never considers the extent of a court's authority to consider claims that an agency has failed to comply with statutory mandates. Accordingly, there is no direct conflict with *Lujan* which would warrant Supreme Court review.

Second, the portion of *Lujan* upon which BLM relies turned entirely upon the programmatic nature of the plaintiffs' claims in that case. BLM Pet. at 11-12 (discussing *Lujan*, 497 U.S. at 891-94). Rather than challenge any specific agency decision or failure to act, the plaintiffs in *Lujan* sought "wholesale" improvement in the government's so-called "land withdrawal review program," which was

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U.S.C. § 706(2)(A), a provision that is not addressed in either of the petitions to this Court).

plaintiffs' shorthand reference for all of the 1,250 or so discrete public lands management decisions made pursuant to a host of FLPMA requirements. *Lujan*, 497 U.S. at 875-89. Although the plaintiffs alleged that legal violations were rampant within the "program," they did not narrowly challenge the government's failure in any particular instance to comply with any particular statute.[7] Indeed, the claims in that case were so exceptionally broad that the *Lujan* court understood the plaintiffs to be challenging even "actions yet to be taken." *Id.* at 893. Given their exceptional breadth, it is not surprising that the *Lujan* court saw plaintiffs' claims as an attempt at the "wholesale improvement of this program by court decree." *Id.* at 891.

SUWA's claims bear no resemblance to the sweeping programmatic claims raised in *Lujan*. Unlike the plaintiffs in *Lujan*, the three claims pursued in SUWA's preliminary injunction motion challenge BLM's failure to comply in particular respects with specific and well-defined legal duties on particular BLM lands. The first claim alleged that BLM was violating FLPMA's nonimpairment duty in four specific WSAs. *See* BLM App. at 6a-7a n.3. The second claim alleged that BLM's failure to comply with two area-specific land use plan provisions violated FLPMA's land use plan

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[7] BLM cites *Lujan* for the proposition that judicial review is not available to address an agency's failure to revise its land use plans, failure to prepare an adequate EIS, failure to consider multiple uses, and failure to provide the statutorily required public notice. BLM Pet. at 17. BLM misreads *Lujan*. This Court made plain in that case that any of these failures could be challenged on a "case-by-case" basis. *Lujan*, 497 U.S. at 894. What a plaintiff may not do under *Lujan* is to seek the wholesale improvement of an agency's behavior by alleging generally that some agency "program" is riddled with illegality. Because SUWA has challenged BLM's failure to take specific actions for violating specific statutes, the Tenth Circuit's decision below does not conflict with *Lujan*.

consistency requirement. *Id.* at 25a-26a. The third claim alleged that BLM violated NEPA by failing to determine whether dramatic increases in ORV use in five specific areas in Utah triggered the agency's duty to supplement particular NEPA analyses. *Id.* at 32a. Thus, SUWA has done what the *Lujan* plaintiffs did not: it specified clear legal obligations being violated in specific areas and sought to compel specific agency actions to bring BLM into compliance with the law.

BLM's claim that this case conflicts with *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), is similarly unconvincing. BLM Pet. at 9. Like the plaintiffs in *Lujan*, the Sierra Club in *Peterson* raised a sweeping challenge to an agency's entire program. Rather than challenge any particular timber sale on the grounds that it violated a particular statute, the Sierra Club challenged the Forest Service's general management approach over the prior two decades on the Texas national forests. *Id.* at 563-64.

SUWA's claims are entirely different from the program-wide claim pursued by the Sierra Club in *Peterson*. First, while the Sierra Club raised programmatic claims that swept across every acre of the Texas national forests, SUWA's claims target site-specific legal violations. Second, while the Sierra Club tried to use *past* legal violations to enjoin all *future* timber sales – future sales that the Club had not actually proven would be illegal – SUWA seeks site-specific relief that would remedy the existing harm caused by the agency inaction that gave rise to SUWA's claims. Third, whereas the source of the alleged violations in *Peterson* were affirmative agency actions – *i.e.*, past timber sales – that the Sierra Club tried to recast, in the alternative, as instances of inaction, the violations complained of by SUWA stem from true failures to act: BLM's failure to prevent cross-country ORV travel from impairing four WSAs, failure to comply with the requirements of two land use plans, and failure to

determine whether new information triggered the duty to prepare five supplemental NEPA analyses.[8]

This case is distinguishable from *Lujan* and *Peterson* in another important respect. Whereas the courts stressed in both of those cases that the plaintiffs could pursue their challenges on a case-by-case basis, BLM's arguments in this case would leave SUWA without any legal remedy. *Lujan*, 497 U.S. at 894; *Peterson*, 228 F.3d at 568-69; *see also id.* at 571-72 (Higginbotham, J., concurring). Before any environmental impact is felt from a land withdrawal or timber sale decision of the sort at issue in *Lujan* or *Peterson*, the agency must take formal action by approving the withdrawal decision or timber sale. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30 (1998) (discussing two-stage process for timber sales). As the *Lujan* and *Peterson* courts appreciated, such decisions are final agency actions that may be challenged and enjoined in a site-specific case.

The instant case is quite different. Unlike logging and land withdrawals, no additional final agency action is necessary for cross-country ORV use in Utah's WSAs to continue and expand into the future, thereby furthering the impairment of the WSAs that Congress ordered protected.

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[8] ORV Intervenors suggest that the decision below is inconsistent with *Ecology Center. Inc. v. United States Forest Service*, 192 F.3d 922 (9th Cir. 1999), which they insist stands for the proposition that courts lack jurisdiction under § 706(1) if an agency has taken *some* action towards someday satisfying its statutory duty. ORV Pet. at 25. However, in *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-109); 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No 03-123), a subsequent Ninth Circuit panel (which included two of the judges from *Ecology Center*), rejected this reading of *Ecology Center. See also Center for Biological Diversity v. Veneman*, 335 F.3d 849, 857 (9th Cir. 2003).

Because no further agency action is required, SUWA may *never* have the opportunity to challenge BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action.[9] Therefore, if SUWA cannot challenge an agency's violation of the nonimpairment mandate under 5 U.S.C. § 706(1), the agency could evade judicial review indefinitely by allowing ORVs to impair WSAs and never taking any final agency action to prevent the impairment.

III. The Issues That BLM Raises In Its Petition Are Not Presented In This Case.

BLM asks this Court to grant its petition for a writ of certiorari so that the Court may resolve two questions concerning judicial review: (1) whether a court may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards"; and (2) whether a court may hear a challenge to agency inaction when the missing action would not itself be a "final agency action" under the APA. Neither issue, though, is presented in this case.

As pointed out above, none of the claims pursued by SUWA in the preliminary injunction proceedings was "general" or "programmatic" in nature. Rather, SUWA challenged BLM's failure to take a specific action or meet a

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[9] ORV Intervenors' suggestion that SUWA could challenge individual trail closure decisions, ORV Pet. at 19, ignores the fact that this case challenges BLM's failure to impose just such restrictions. Furthermore, the fact that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit – does not mean that SUWA can pursue its nonimpairment claims through 5 U.S.C. § 706(2)(A) challenges to final agency action, as the ORV Intervenors assume. In a challenge to the adequacy of a discrete ORV closure in one corner of Utah, SUWA could not argue that the closure violates the law because it fails to adequately protect WSAs in another corner of the State.

specific legal requirement in a specific area. *See supra* at 14-16. Because none of these claims presents a "programmatic challenge" or involves "general" statutory duties, BLM's concerns with judicial review of such claims cannot justify Supreme Court consideration.

Nor does this case give rise to BLM's second concern: whether a court may hear a challenge to an agency's failure to take non-final action.[10] In its motion for preliminary injunction, SUWA asked the court to order BLM to close several WSAs to ORV travel in order to prevent the impairment of the areas in violation of 43 U.S.C. § 1782(c). This Court has explicitly recognized that such road closure decisions are final agency actions subject to APA challenge. *Ohio Forestry*, 523 U.S. at 738-39; *see also Mausolf v. Babbitt*, 125 F.3d 661, 669-70 (8th Cir. 1997); BLM App. at 18a n.10 (describing other final actions that BLM might take to prevent impairment).

BLM's assertion that SUWA is seeking to compel non-final agency action through its land use plan consistency claim is likewise unavailing.[11] BLM is simply wrong when it relies upon *Ohio Forestry* for the proposition that all land use plan provisions, including those invoked by SUWA in this case, are merely "antecedent ... planning activities" that do not "create any legal rights or obligations." BLM Pet. at 23-24. In fact, while this Court held in *Ohio Forestry* that a challenge to the logging allowed by a particular forest plan was not ripe for review because no trees could be cut until a

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[10] BLM does not argue that there is a circuit split concerning whether a court may compel non-final action. Indeed, the agency fails to provide a single citation to case authority from any level that holds that only "final" action may be compelled.

[11] Since the filing of this lawsuit, BLM has begun to comply with the two management commitments whose performance SUWA sought to compel in this case. *See supra* at 6 n.2.

second stage of decision-making had taken place, *Ohio Forestry*, 523 U.S. at 732-37, this Court recognized that forest plans do make some decisions that have an immediate impact and that those decisions may be challenged immediately, *id.* at 738-39.

The land use plan decisions at issue here are just the sort of final actions recognized in *Ohio Forestry*. Contrary to BLM's assertion that the San Rafael Route Designation Plan would not "alter the legal regime ... in any respect concerning off-road vehicle use," BLM Pet. at 23 (quoting *Ohio Forestry*, 523 U.S. at 733), the route designation decisions made in that document determine which routes will be closed and which will be open to ORV use by the public. *See* http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm (announcing that the route designation decision leaves 677 miles of vehicle routes open to ORVs and closes 468 miles to ORVs). Such route closure orders are explicitly mentioned in *Ohio Forestry* as the sort of planning decision that may be challenged immediately. *Ohio Forestry*, 523 U.S. at 738-39.[12] Indeed, the government itself admitted in its briefing and again at oral argument in *Ohio Forestry* that road closure decisions made in plans may be challenged immediately. *Id.* at 739.[13]

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[12] The San Rafael Route Designation Plan is, in fact, the subject of several pending challenges by ORV advocates before the Interior Board of Land Appeals. *See Huck v. BLM*, IBLA No. 2003-169; *Telepak v. BLM*, IBLA No. 2003-170; *Norton v. BLM*, IBLA No. 2003-171; *Southeastern Utah OHV Club v. BLM*, IBLA No. 2003-172.

[13] BLM also seeks review on the basis of its belief that FLPMA's plan consistency provision requires only that independent future projects approved by the agency be consistent with the applicable land use plan and that BLM need not comply with specific affirmative management commitments made by the agency in its plans. BLM Pet. at 24. This argument goes to the

BLM's concern that SUWA seeks to compel non-final agency action in its supplemental NEPA claim is similarly misplaced. BLM is simply incorrect when it asserts that the NEPA decision document sought by SUWA is not a final agency action. BLM Pet. at 21. An agency's decision whether or not it will prepare a supplemental NEPA document marks the end of that decision-making process and, as such, has always been treated by this Court and others as a final and challengeable action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 662-64 (3rd Cir. 1999); *Hughes River*, 81 F.3d at 442-46; *Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991).[14] There is no circuit split or other reason to

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merits of SUWA's claims and has nothing to do with subject matter jurisdiction. In any case, the Tenth Circuit rightly rejected BLM's argument as contrary to the "simpl[e] and straightforward[]" terms of FLPMA and its regulations. BLM App. at 29a. 43 C.F.R. § 1610.5-3(a) states that *"[a]ll future resource management* authorizations and *actions . . . shall* conform to the approved plan." (Emphasis added.) Because the 1990 Henry Mountains ORV Implementation Plan declares that BLM will conduct intensive monitoring at Factory Butte, the only way that BLM can "conform" its management actions to this provision is to do the promised monitoring. By the same token, because the 1991 San Rafael Resource Management Plan decides that BLM will limit ORV use to designated trails in the San Rafael area, the agency can "conform" its actions to the plan only by following through with the trail designations.

[14] BLM's claim that SUWA's supplemental NEPA challenge is not related to any final agency action also ignores the ongoing impact of decisions made in the land use plans at issue in this case. Based on the NEPA analyses that accompanied the adoption of the land use plans, those plans provided that millions of acres would be open to unrestricted ORV use. The impacts of those decisions are not limited to the moment the plans were adopted, but rather are felt throughout the life of the plans. Thus, far from being

justify reviewing this consistent treatment of supplemental NEPA claims.[15]

IV. The Tenth Circuit's Decision To Allow SUWA's Unexceptional APA Claims To Proceed Is Consistent With The Treatment Of Such Claims By Other Courts.

Section 706(1) empowers courts to compel federal agencies to comply with mandatory statutory duties. FLPMA unquestionably imposes such a duty by mandating that BLM "shall" manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall'").

It is well settled that § 706(1) may be used to compel an agency to exercise its discretion when the exercise of that discretion is statutorily required. For example, in the 1947 Attorney General's Manual on the APA, the authors noted in their discussion of § 706(1) that "a court may require an agency to take action upon a matter, without directing how it

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"divorced from" any major federal action, as BLM claims (BLM Pet. at 22), SUWA's supplemental NEPA claim is tied to the effects of major federal actions that are still having significant ongoing environmental impacts.

[15] BLM also objects that SUWA's supplemental NEPA claim could "intrude" upon BLM's planning activities, thereby diverting its resources "from the activities chosen by the agency." BLM Pet. at 10, 28. If anything, this argument goes to the merits or relief for the NEPA claim; it has nothing to do with a court's authority under the APA. Moreover, if jurisdiction over failure-to-act claims turned on whether an agency would choose to focus on other activities, jurisdiction would never exist because failure-to-act claims, by definition, involve an agency that has chosen to ignore its statutory duty and spend its resources elsewhere.

shall act." Attorney General's Manual on the Administrative Procedure Act, at 108 (1947). SUWA's nonimpairment claim fits this "mandatory-exercise-of-discretion" paradigm perfectly; SUWA asked the district court to compel BLM to exercise its management discretion so as to satisfy the agency's mandatory duty under FLPMA to prevent the impairment of four specific WSAs. [16]

The unexceptional nature of SUWA's nonimpairment claim is underscored by the many analogous cases in which courts have considered inaction claims under the APA. For example, in *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987), then-Judge Breyer held that HUD's failure to comply with its ongoing statutory obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" set forth in the Fair Housing Act was subject to judicial review under § 706(1). *Id.* at 151, 160. In doing so, Judge Breyer concluded that the APA's "broad presumption in favor of judicial review of agency action" is not overcome by the agency's discretion concerning precisely how to discharge its

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[16] BLM asserts that SUWA's claims should be rejected because doing so will force the public to first petition BLM for a change in land management under 5 U.S.C. § 553(e), thus affording agencies the opportunity to make a final challengeable decision regarding the public's concerns. BLM Pet. at 18. This argument suffers from many flaws. First, SUWA did, in fact, request that BLM comply with its statutory duties to restrict ORV in many of the areas at issue here. *See* text *supra* at 6-7. This case arose when BLM failed to respond. Second, quite apart from § 553(e)'s rulemaking procedure, the APA specifically provides for challenges to agency inaction. *See* 5 U.S.C. § 551(13) (challengeable "agency action" includes the "failure to act"). Third, § 553(e) applies only to petitions for new rules and has nothing to do with forcing an agency to comply with existing law and regulation, as SUWA is seeking to do in this case.

legal duties. *Id.* at 157 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The principle that a plaintiff may challenge an agency's failure to comply with a statutory duty that involves the exercise of agency discretion has been recognized by appellate courts across the nation. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003); *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32-35 (D.C. Cir. 1984); *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 853-57 (9th Cir. 2003) (court has the power under 5 U.S.C. § 706(1) to compel Forest Service to comply with duty to consider the effects of its planning decisions on 57 identified rivers); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (compelling the Fish and Wildlife Service under § 706(1) to designate Endangered Species Act "critical habitat" even though the designation decision involves an exercise of discretion and agency expertise); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

The Ninth Circuit reached the same conclusion in *Montana Wilderness Ass'n v. United States Forest Service*, 314 F.3d 1146 (9th Cir. 2003), in which the court affirmed the district court's authority to decide whether the Forest Service violated a comparable nonimpairment duty in its management of WSAs in Montana. In that case, the government argued, as it does here, that the courts may not hear a challenge under § 706(1) to the agency's failure to satisfy this mandatory duty because the statute does not prescribe the precise manner in which the Forest Service is to satisfy this nonimpairment requirement. *Id.* at 1151. Judge

Trott, writing for a unanimous panel, rejected the government's characterization of the nonimpairment requirement as a "general" statutory duty and instead concluded that it:

> establishes a management directive requiring the Forest Service to administer the Study Areas to "maintain" wilderness character and potential for inclusion in the Wilderness System. . . . *[T]he Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under section 706(1).*

Montana Wilderness, 314 F.3d at 1151 (emphasis added).

As these cases demonstrate, Congress often imposes a mandatory duty to achieve or avoid some end without saying exactly how the agency must satisfy that mandate. These mandatory duties are as binding and justiciable under the APA as any others.[17] Contrary to BLM's suggestion, treating them as such is in no way contrary to the mandamus principles from which it claims § 706(1) was derived. BLM Pet. at 15-17. Courts may issue writs of mandamus even if a statute leaves an agency with some discretion about how to

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[17] BLM warns darkly that such inaction claims will "almost inevitably" require a court to substitute its judgment for an agency on a "grand scale." BLM Pet. at 17. The agency's fear is unwarranted. The court's role in assessing such inaction claims is simply to determine whether, in fact, the agency is meeting the statutory requirement (in this case, preventing the impairment of the specific WSAs), and, if necessary, to fashion appropriate injunctive relief. Far from "significantly disrupt[ing]" public lands management, BLM Pet. at 27, the public would be forcing BLM to manage those lands in keeping with Congress's command. This is exactly the role that the APA's review provisions are meant to allow the courts to play.

satisfy a mandatory requirement. As this Court has recognized, mandamus may be used "to compel action, when refused, *in matters involving judgment and discretion . . . .*" *Wilbur v. United States ex rel. Kadrie,* 281 U.S. 206, 218 (1930) (emphasis added). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) ("While it is true that the writ of mandamus is chiefly used to compel the performance of a ministerial duty, '[i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion'") (quoting *Miguel v. McCarl*, 291 U.S. 442, 451 (1934)); *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) ("*even in an area generally left to agency discretion*, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, *mandamus will lie when the standards have been ignored or violated*") (quoting *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)) (emphasis added); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Davis Assocs., Inc. v. Secretary, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947).

This is exactly the case here. Congress imposed a nonimpairment requirement in FLPMA. While FLPMA may leave BLM with discretion regarding how to satisfy this mandate in particular situations, the statute unquestionably removes BLM's discretion to permit impairment. The Tenth Circuit's conclusion that the district court had the authority to review BLM's compliance with the nonimpairment mandate does not warrant Supreme Court review.

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **SECOND AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

Plaintiffs SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, THE WILDLANDS CENTER FOR PREVENTING ROADS, a Montana non-profit corporation, UTAH COUNCIL OF TROUT UNLIMITED, a Utah non-profit corporation, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and the FRIENDS OF THE ABAJOS, a Utah non-profit corporation, as a complaint and cause of action against the defendants BUREAU OF LAND MANAGEMENT ("BLM"), Secretary of Interior BRUCE BABBITT ("the Secretary"), and BLM Acting Director TOM FRY, allege as follows:

INTRODUCTION

1. This suit challenges BLM's failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders and its own regulations to, among other things, minimize the effects of ORVs on public land resources; to designate trails and inform the public where ORVs may and may not travel; and to monitor the impacts of ORV use. BLM has neglected these responsibilities, and as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including designated wilderness study areas and areas that are eligible for wilderness designation in the future.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Federal Land Policy

Management Act ("FLPMA"), 43 U.S.C. § 1701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq, and federal question, 28 U.S.C. § 1331.

3. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

4. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

5. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE ("SUWA") is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and undeveloped lands. SUWA has more than 18,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands in and throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter -- they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are significantly impaired by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

6. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization

founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has 188,000 members nationwide, approximately 1,224 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

7. Plaintiff THE SIERRA CLUB is a non-profit corporation with its principal place of business in San Francisco, California. The Sierra Club is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 6000 members. The Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

8. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to Southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

9. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has 23 members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

10. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

11. Plaintiff AMERICAN LANDS ALLIANCE is a national non-profit corporation committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff, and members use and enjoy Utah's BLM lands, for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from uncontrolled ORV abuses on BLM lands.

12. Plaintiff FRIENDS OF THE ABAJOS is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Friends of the Abajos has more than twenty members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Friends of the Abajos members use Utah BLM

lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

13. Defendant BLM is the agency within the U.S. Department of Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

14. Defendant Bruce Babbitt is the Secretary of the United States Department of Interior, and, among other things is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within his control.

15. Defendant Tom Fry is the acting Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

16. Off-road vehicle or "ORV" is the generic term used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles or "ATVs." When used in areas that cannot sustain their impacts, ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and serious harm to cultural resources. Uncontrolled

ORV use also causes significant conflicts among public land users, as well as the significant impairment of the wilderness qualities of Utah's public lands.

Harm to Soils

17. Fragile soils are damaged by unregulated ORV abuse, and even the single pass of an ORV on sensitive soils, like those found throughout Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased wind and water erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel.

18. In some instances ORV use causes the complete removal of soil down to the bedrock layer. Soil erosion is exacerbated when wind or rain strikes a denuded slope, and the soil migrates downslope or is moved large distances by strong winds. In many of Utah's most spectacular lands, including wilderness study areas (WSAs) in the San Rafael Swell evidence of soil erosion is commonplace and widespread. ORV caused soil erosion also degrades water and air quality.

Harm to Vegetation

19. ORVs have significantly impacted Utah's vegetation, in part as a result of the widespread erosion discussed above. These impacts range from the destruction of fragile cryptobiotic crusts, to the wholesale loss of annual and perennial species, as well as damage to mature trees. Ultimately, web-like networks of ORV trails may coalesce into broad areas largely denuded of vegetation. Such impacts are easily seen in place like Behind the Rocks and Sids Mountain wilderness study areas ("WSAs").

20. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic crusts which are critical to many plant communities. These crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility. Studies have documented that even a single pass by an ORV is sufficient to destroy these crusts, and that recurrent ORV travel causes substantial harm. Such harm is evident, among other places, throughout Indian Creek WSA and Utah's fragile Cedar Mesa where denuded landscapes have become a commonplace occurrence.

Harm to Wildlife

21. Numerous studies have documented both direct and indirect ORV caused harm to wildlife. ORV use frequently leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances. Despite this identified increased risk, current ORV classifications in the places like the Book Cliffs permit unfettered ORV travel through such areas.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation. For example, a popular ORV trail in Arch Canyon crosses

Arch Creek over 55 times in seven miles, resulting in increased sedimentation, eroding streambanks, and a reduction in riparian plants.

Harm to Cultural Resources

24. Numerous studies have concluded that the proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting or vandalism these sites receive.

25. In Utah, there have been numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism. For example, pothunters traveling throughout Cedar Mesa on ORVs have vandalized cultural resources.

Increased User Conflicts

26. ORV use has been shown to displace other non-motorized trail users, and studies have even shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

27. ORV and non-motorized conflicts are widely evident throughout Utah's BLM lands. For example, BLM's Price field office's own documents show that it has received numerous letters from non-motorized visitors to the San Rafael Swell detailing "run-ins" with ORV users. These encounters have ranged from finding recent resource destruction, to disputes with ORV users.

Wilderness Suitability

28. As BLM's own reports show, ORVs have caused, and continue to cause, significant impairment to WSAs, as well as lands recognized by both the BLM and the

Utah Wilderness Coalition as having wilderness characteristics. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, ORV users do not remain on these trails but instead frequently travel cross-country and create additional new routes causing damage similar to that described above.

29. For example, ORVs legally access WSAs such as Parunuweap, Crack Canyon, Sids Mountain, and San Rafael Reef through "existing" trails, but ORVs then proceed to travel off-route and cause significant harm to wilderness resources, including destruction of cryptobiotic soil, soil erosion, and permanent, lasting scars to the landscape. Thus, these WSAs and numerous others are suffering significant damage from ORVs, in some cases, to such a level that their suitability for wilderness designation is threatened.

30. BLM's original wilderness inventory pursuant to Section 603 of FLPMA was completed in 1980. In 1999, BLM conducted a supplemental wilderness inventory of the public lands it manages in Utah ("the 1999 Inventory"). The 1999 Inventory identified an additional 2.6 million acres of BLM lands with wilderness characteristics. Although they have the scenic and other qualities necessary for wilderness protection, these areas remain largely open to unrestricted ORV travel.

31. Some of the lands within BLM's 1999 Inventory are threatened by sustained ORV damage, to the point that their future designation as congressionally designated wilderness may be jeopardized.

32. Finally, the Utah Wilderness Coalition has identified 3.3 million acres of BLM lands in addition to existing WSAs and those lands identified in BLM's 1999 Inventory as having wilderness characteristics. Some of these lands are primarily located in areas classified as "open"

to unrestricted ORV travel, and their continuing eligibility for wilderness designation is threatened by significant resource degradation from ORV use.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LANDS

33. In 1972 President Nixon issued Executive Order 11644, which imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

34. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644, and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage. The Executive Orders were enacted in furtherance of NEPA, and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS AND BLM REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in: Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is comprised of former Resource Areas and/or Planning Units, and, with the exception of the St. George field office, each office is guided by Resource Management Plans (RMPs) and Management Framework Plans (MFPs) that reference earlier planning designations.

37. On May 18, 1998, SUWA filed a Freedom of Information Act ("FOIA") request pertaining to ORV use on BLM lands with the Utah BLM State Office. (Attached as Exhibit A). SUWA's comprehensive FOIA request sought information on all aspects of Utah BLM's ORV management, including the agency's compliance with the Executive Orders and BLM's own regulations. After BLM's initial refusal to provide the documents, nearly a year later SUWA received both a complete set of the requested information as well as notices from every Utah field office stating that the particular office had fully complied with SUWA's FOIA request. (Attached as Exhibit B). Field office responses to SUWA's FOIA were compiled in individual offices and then sent to the State Office for distribution to SUWA.

38. All of Utah's BLM lands have been classified in MFPs, RMPs, or plan amendments as either "open," "limited," or "closed" to ORV travel.

39. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every

Utah field office has lands designated as "open" to cross-country ORV travel. For example, the Mountain Valley Planning Unit (Richfield Field Office) and the Pinyon Planning Unit (Cedar City District Office) are in effect entirely open to cross-country ORV travel, with only a handful of unsigned and unidentified limitations or closures.

40. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

41. Although many "limited" areas restrict ORV use to "existing" routes and trails, there is no way to ascertain the routes to which ORVs are restricted because the Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, areas classified as "limited" have suffered a broad expansion of the "existing" trail network without the necessary public input required in BLM's regulations. In fact, there is no map indicating the existing trail network in any Utah field office.

42. BLM law enforcement is unable to enforce "limited" classifications without actual "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification. As a result of this fact, 94% of Utah BLM lands remain, as a practical matter, open for unrestricted ORV use.

43. Although specifically charged to "monitor the effects of the use of [ORVs]," Utah BLM has with limited exceptions not engaged in such monitoring. In particular, with the exception of the Mountain Valley Planning Unit and sporadic, anecdotal monitoring in existing WSAs, the BLM

has no documentation of any monitoring of ORV use or impacts.

44. Because BLM has failed to monitor ORV use, it cannot and does not know, whether the current classifications "minimize" ORV impacts, as directed by the Executive Orders and its own regulations.

45. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. With respect to each of the land use planning documents, one or more, and sometimes all of these commitments has not been carried out.

46. Of particular importance to plaintiffs, BLM's failure to adequately control ORV use has resulted in actual, documented harm to existing WSAs, as well as areas identified by the Utah Wilderness Coalition and the BLM as having wilderness characteristics. For instance, in Parunuweap and Canaan Mountain WSAs, repeated ORV abuses have left lasting scars that may prevent these units from being congressionally designated Wilderness. In addition, ORV abuses have escalated to the point that lands identified by UWC as having wilderness characteristics have been entirely removed from consideration.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

47. The allegations of paragraphs 1-46 are incorporated herein by reference.

48. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

49. Every Utah BLM has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

50. Utah BLM undertook to comply with these regulations with respect to "limited" areas by committing in land use planning documents to undertake designation of trails on which ORV use would be permitted. Not a single Utah BLM field office has completed its trail designations in areas identified as "limited" in the relevant land use planning document. Accordingly, BLM has violated Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

51. The allegations contained in Paragraphs 1-50 are incorporated herein by reference.

52. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including

maps, describing such areas and trails and explaining the conditions of vehicle use."

53. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id., see also 43 C.F.R. § 1610.5-1(b).

54. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use. Accordingly, BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Third Cause of Action

Failure to Monitor ORV Impacts
(Executive Order 11644 §8 and 43 C.F.R. § 8342.3)

55. The allegations of paragraphs 1-54 are incorporated herein by reference.

56. Section 8 of Executive Order 11644 directs the Secretary to monitor "the effects of the use of [ORVs]" and to change ORV designations whenever the minimization criteria in Section 3 are not met.

57. 43 C.F.R. §8342.3 specifically charges BLM to monitor the "effects of the use of off-road vehicles." Based upon that information, BLM may amend, revise, revoke, or take other actions to ensure that it is complying

with the Executive Orders and its own regulations. See id.

58. Every Utah BLM field office, with the exception of the Mountain Valley Planning Unit, has failed to monitor ORV impacts on lands outside of WSAs. Accordingly, BLM has violated Executive Order 11644 § 8(a) and 43 C.F.R. § 8342.3, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fourth Cause of Action

Failure to Ensure Public Participation in Trail Designation (Executive Order 11644 §3 and 43 C.F.R. § 8342.2)

59. The allegations contained in paragraphs 1-58 are incorporated by reference herein.

60. Section 3 of Executive Order 11644 provides that the BLM "shall ensure adequate opportunity for public participation in the . . . designation of areas and trails."

61. 43 C.F.R. § 8342.2(a) states that the "designation [of] trails . . . is accomplished through the resource management planning process described in [43 C.F.R. § 1600]. . . . Prior to making designations . . . the authorized officer shall consult with interested user groups, Federal, State, county and local agencies, local landowners, and other parties in a manner that provides an opportunity for the public to express itself and have its views given consideration."

62. Every Utah BLM field office has permitted the creation of ORV "user trails" -- created solely by the passage of vehicles -- in "limited" and/or "open" areas without seeking public participation or initiating the resource management planning process. For example, in Sids Mountain, Indian Creek, and Deep Creek Mountains WSAs,

the BLM permitted, without seeking public participation, the creation of numerous ORV user trails; trails which have left significant and in some instances irreparable scars on the landscape.

63. Accordingly, BLM has violated Executive Order 11644 §3(b) and 43 C.F.R. § 8342.2(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fifth Cause of Action

BLM Has Failed to Conform Its Actions to Approved Land Use Management Plans (43 C.F.R. § 1610.5)

64. The allegations contained in paragraphs 1-63 are incorporated by reference herein.

65. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

66. As set forth above, every Utah BLM field office has land use planning documents whose nondiscretionary future duties and commitments to manage ORVs have not been carried out. These commitments include: the preparation of detailed ORV implementation plans and/or ORV travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails. Accordingly, BLM has violated 43 C.F.R. § 1610.5-3 and section 706(1) of the APA, 5 U.S.C. § 706(1).

Sixth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard (43 U.S.C. § 1782(c))

67. The allegations contained in paragraphs 1-66 are incorporated by reference herein.

68. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

69. BLM has in the past, and continues today to permit ORVs to impair the suitability of existing WSAs from entry into the national wilderness preservation system.

70. For example, WSAs such as Parunuweap, Canaan Mountain, Behind the Rocks, and Sids Mountains all are suffering impairment that may ultimately disqualify them from wilderness designation. Accordingly, BLM has violated 43 C.F.R. § 1782(c) and section 706(1) of the APA, 5 U.S.C. § 706(1).

Seventh Cause of Action

Failure to Produce Supplemental Environmental Impact Statements (42 U.S.C. § 4332 and 40 C.F.R. § 1502.9*)*

71. The allegations contained in paragraphs 1-70 are incorporated herein by reference.

72. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to prepare

a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action" or if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

73. Every Utah BLM Field Office's land use planning documents, including resource management plans, management framework plans, and plan amendments, fail to accurately analyze the current use of ORVs on BLM lands, and specifically, fail to analyze the environmental impacts of that use, the relationship between the short-term use of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources created by ORV use. Accordingly, BLM's failure to prepare supplemental EISs violates 42 U.S.C. 4332, § 40 C.F.R. 1502.9(c)(i) and (ii), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Eighth Cause of Action

Violation of the Administrative Procedure Act (5 U.S.C. § 706(1))

74. The allegations contained in paragraphs 1-73 are incorporated by reference herein.

75. The Secretary and BLM have failed to comply with the duties clearly enumerated in Executive Orders 11644 and 11989, and 43 C.F.R. §§ 1610.5-3 and 8341-8343, as set forth above. Such failure constitutes agency action unlawfully withheld or unreasonably delayed, and thus SUWA is entitled to a finding that the Secretary and BLM has violated the APA, 5 U.S.C. § 706(1).

Ninth Cause of Action

Failure to Prevent ORV Damage and Preserve Full Range of Options (42 U.S.C. § 4332 and 40 C.F.R. § 1506.1)

76. The allegations contained in paragraphs 1-75 are incorporated herein by reference.

77. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1506.1(a) further directs federal agencies preparing an environmental impact statement to take no action concerning the proposal which would "(1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives."

78. The BLM is currently considering a proposal to create numerous FLPMA §202 WSAs throughout Utah. See 64 Fed. Reg. 59787-59789 (Nov. 3, 1999) ("Notice of Intent to Modify Scope of Statewide Environmental Impact Statement (EIS) and Multiple-Plan Amendments Considering Establishment of New Wilderness Study Areas (WSAs) on Selected Public Lands in Utah, and Call for Additional Information). Currently, the BLM permits ORVs to travel within these proposed WSA on "existing routes and ways," or, in some instances, cross-country. This ORV travel has resulted in damage which is having adverse environmental impacts and may, if unchecked, limit the opportunity for these lands to be protected as WSAs.

79. Accordingly, the BLM's failure to preserve a full range of options violates 42 U.S.C. § 4332, 40 C.F.R. § 1506.1(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Tenth Cause of Action

Violation of FLPMA's
Non-Degradation Standard
(43 U.S.C. § 1732(b))

80. The allegations contained in paragraphs 1-79 are incorporated herein by reference.

81. Section 1732(b) of FLPMA states that BLM shall manage its lands "to prevent undue and unnecessary degradation."

82. BLM has in the past and continues today to permit ORV damage to cause undue and unnecessary degradation to Utah BLM lands. For example, lands proposed for wilderness designation in America's Redrock Wilderness Bill such as Eagle Canyon, Indian Creek, and Cedar Mountains North are suffering ORV caused damage and degradation.

83. Accordingly, BLM has violated 43 C.F.R. § 1732(b) and section 706(1) of the APA, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Bruce Babbitt, Acting Director Tom Fry, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy Management Act, the Administrative Procedure Act, and their implementing regulations as set forth above;

(2) Declare that in "limited" areas BLM must designate specific roads and trails available for ORV use, and that such designations must minimize ORV effects;

(3) Declare that the BLM must provide public information in the form of road and trail markings, and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM must engage in comprehensive and systematic monitoring of ORV use on lands within its control;

(5) Declare that BLM has violated § 603(c) of the Federal Policy Management Act by permitting ORVs to impair the suitability of existing wilderness study areas for entry into the national wilderness preservation system.

(6) Award injunctive relief prohibiting the use of all ORVs on lands currently identified by the BLM as having wilderness characteristics, as well as those lands identified within the America's Redrock Wilderness Bill, H.R. 1732, that are suffering significant ORV caused impairment of their resources, including suitability for entry into the National Wilderness Preservation System.

(7) Declare that BLM has violated 40 C.F.R. § 1506.1 by permitting ORVs to impair the wilderness qualities of lands proposed by the BLM in its ongoing statewide wilderness study area environmental impact studies for FLPMA §202 WSA status.

(8) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands.

(9) Retain jurisdiction of this action to ensure compliance with its decree;

(10) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions;

(11) Grant such other and further relief as is proper.

Respectfully submitted this __ day of May, 2000.

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **THIRD AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

INTRODUCTION

1. This suit challenges the Bureau of Land Management's ("BLM's") failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders, federal laws, and its own regulations to, among other things, prevent the impairment of wilderness study areas ("WSAs"), minimize the effects of ORVs on public land resources, consistently implement the terms and conditions of its land use plans ("LUPs"), and determine whether its LUPs and their accompanying environmental analyses accurately evaluate current levels of ORV use and damage on the public lands. BLM has neglected these responsibilities, and, as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including WSAs.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

3. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

4. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and

undeveloped lands. SUWA has more than 15,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter because they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are damaged by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of over 200 local and national organizations dedicated to the passage of America's Redrock Wilderness Act. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

5. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has over 180,000 members nationwide, approximately 1200 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

6. Plaintiff THE SIERRA CLUB is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 4000 members. The

Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

7. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

8. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing

inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has several members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

9. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

10. Plaintiff AMERICAN LANDS ALLIANCE is a non-profit organization committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff and members use and enjoy Utah's BLM lands for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from

uncontrolled ORV abuses on BLM lands.

11. Plaintiff REDROCK FORESTS[1] is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Redrock Forests has more than 250 members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Redrock Forests members use Utah BLM lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

12. Defendant BLM is the agency within the U.S. Department of the Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

13. Defendant Gale Norton is the Secretary of the United States Department of the Interior and, among other things, is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within her control. Ms. Norton is sued in her official capacity as Secretary of the Department of the Interior.

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[1] Redrock Forests is the successor organization of "Friends of the Abajos," a named plaintiff in the second amended complaint.

14. Defendant Kathleen Clarke is the Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands. Ms. Clarke is sued in her official capacity as Director of the Bureau of Land Management.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

15. The term ORV is used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles. ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and harm to cultural resources. Uncontrolled ORV use also causes significant conflicts among public land users, as well as the impairment of wilderness study areas.

Harm to Soils

16. Fragile soils are damaged by ORV use. Even the single pass of an ORV on sensitive soils, like those found throughout eastern Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased soil erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel. ORV-caused soil erosion also degrades water and air quality.

17. In many of Utah's most spectacular lands, including the lands managed by the BLM's Moab, Monticello, and Price field offices, evidence of ORV caused soil erosion is commonplace and widespread.

Harm to Vegetation

18. ORVs significantly impact vegetation on Utah BLM lands. These impacts range from the destruction of fragile cryptobiotic soils, to the loss of annual and perennial species, as well as damage to mature trees. In many instances, web-like networks of ORV trails form broad areas largely denuded of vegetation.

19. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic soil crusts that are critical to many plant communities. These living crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility.

20. Even a single pass by an ORV is sufficient to destroy these crusts, and recurrent ORV travel causes substantial harm.

Harm to Wildlife

21. ORV use causes direct and indirect harm to wildlife. ORV use often leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality.

24. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation.

Harm to Cultural Resources

25. The proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting and/or vandalism these sites receive.

26. Utah BLM knows of numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism.

Increased User Conflicts

27. ORV use displaces non-motorized trail users and studies have shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

28. ORV and non-motorized conflicts occur throughout Utah's BLM lands. For example, BLM's Price field office and Henry Mountains Field Station have received numerous letters from non-motorized visitors to the San Rafael Swell and Factory Butte area detailing altercations with ORV users or concerns about ORV damage.

Wilderness Suitability

29. ORVs have caused, and continue to cause, significant impairment to WSAs.

30. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, many ORV users do not remain on these trails but instead travel cross-country and create additional new routes causing damage similar to that described above.

31. For example, ORVs legally access WSAs such as Parunuweap and Sids Mountain through "existing" trails, but then proceed to travel off-route and cause impairment to wilderness resources.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LAND

32. In 1972, President Nixon issued Executive Order 11644, entitled "Use of Off-Road Vehicles on the Public Lands." That Executive Order imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

33. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644 (collectively "the Executive Orders"), and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to

adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage.

34. The Executive Orders were enacted in furtherance of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS, FEDERAL LAWS, AND AGENCY REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is guided by Resource Management Plans (RMPs) and/or Management Framework Plans (MFPs) prepared pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 et seq.

37. All of Utah's BLM lands have been classified in MFPs, RMPs, or subsequent plan amendments as either "open," "limited," or "closed" to ORV travel.

38. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every Utah field office has lands designated as "open" to cross-country ORV travel, though many of these designations were made decades ago when ORV use was low throughout Utah.

39. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

40. Although many "limited" areas restrict ORV use to "existing" routes and trails, BLM does not know the routes to which ORVs are restricted because all Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, BLM offices such as the Monticello field office and Henry Mountains field station that have lands classified as "limited to existing routes and trails" have seen a broad expansion of the "existing" trail network.

41. No Utah BLM field office has a map or information indicating the existing trail network at the time its respective land use plan was finalized.

42. BLM law enforcement is unable to enforce ORV "limited" classifications without actual trail "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification.

43. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for

distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. Many of these commitments have not been carried out.

44. BLM has not prepared and implemented an ORV implementation plan for the San Juan resource area, as required by the 1991 San Juan RMP.

45. BLM does not have a formalized monitoring plan to monitor ORV use in the San Juan resource area, as required by the 1991 San Juan RMP.

46. BLM has not prepared or implemented ORV trail designations through an activity level plan as required by the 1999 St. George RMP.

47. BLM's 2000 Monument Management Plan restricted ORVs to designated trails within the Grand Staircase-Escalante National Monument ("GSENM") or closed areas to ORVs altogether. BLM has not completed on-the-ground signing and other steps necessary to implement the GSENM 2000 management plan.

48. BLM has not prepared or established ORV designations as required by the 1990 Price River ORV Implementation Plan.

49. BLM has not distributed an ORV designation brochure as required by the 1990 Price River ORV Implementation Plan.

50. BLM has not prepared an area-wide ORV plan for the Diamond Mtn. planning area, as required by the 1991 Diamond Mountain RMP.

51. BLM has not prepared or implemented an ORV monitoring system in the Book Cliffs planning area, as required by the 1985 Book Cliffs RMP.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

52. The allegations of paragraphs 1-51 are incorporated herein by reference.

53. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

54. With the exception of the 2003 Price field office San Rafael Swell Route Designation Plan, every Utah BLM field office has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

55. Accordingly, BLM's failure to comply with Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

56. The allegations contained in Paragraphs 1-51 are incorporated herein by reference.

57. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including maps, describing such areas and trails and explaining the conditions of vehicle use."

58. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id. See also 43 C.F.R. § 1610.5-1(b).

59. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use.

60. Accordingly, BLM's failure to comply with Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Third Cause of Action

BLM Has Failed to Conform Its Actions to ApprovedLand Use Management Plans (43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5)

61. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

62. FLPMA requires the Department of the Interior and BLM to "manage the public lands ... in accordance with the land use plans [LUPs] developed ... under section 1712 [of FLPMA]." 43 C.F.R. § 1732(a).

63. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

64. BLM has failed to consistently implement the terms and provisions of its various land use plans, as set forth above.

65. Accordingly, BLM's failure to comply with 43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5-3 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fourth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard (43 U.S.C. § 1782(c))

66. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

67. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

68. BLM has in the past, and continues today to permit ORVs to impair the suitability of WSAs from entry into the national wilderness preservation system.

69. BLM has failed to prevent ORV impairment of the following WSAs: Parunuweap, Canaan Mountain, Moquith Mountain, and Sids Mountains. Accordingly, BLM's failure to comply with 43 C.F.R. § 1782(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fifth Cause of Action

Failure to Produce Supplemental Environmental Impact Statements
(42 U.S.C. § 4332 and 40 C.F.R. § 1502.9)

70. The allegations contained in paragraphs 1-51 are incorporated herein by reference.

71. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c).

72. 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to take a hard look and determine if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," and if so to prepare a supplemental NEPA document. In addition, NEPA's regulations require federal agencies to prepare a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action."

73. Every Utah BLM Field Office has failed to take a hard look at whether its land use planning documents, including resource management plans, management framework plans, plan amendments, and activity level plans, accurately analyze current ORV use and damage on Utah BLM lands, and where necessary prepare supplemental NEPA documents to address these changes.

74. Accordingly, BLM's failure comply with 42 U.S.C. 4332 and § 40 C.F.R. 1502.9(c)(i) and (ii), is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Gale Norton, Director Kathleen Clarke, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy and Management Act, the National Environmental Policy Act, their implementing regulations as set forth above;

(2) Declare that BLM has violated Executive Order 11644 § 3 and 43 C.F.R. § 8342 by failing to designate specific roads and trails available for ORV use in "limited areas";

(3) Declare that BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342 by failing to provide public information in the form of road and trail markings,

and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM has violated § 603(c) of the Federal Land Policy and Management Act by permitting ORVs to impair the suitability of wilderness study areas for entry into the national wilderness preservation system;

(5) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands;

(6) Declare that BLM has violated NEPA implementing regulation 40 C.F.R. § 1502.9 by failing to take a hard look at whether current levels of ORV use and damage exceed those analyzed in existing land use plans and their respective NEPA analyses;

(7) Declare that BLM has violated NEPA by failing to prepare supplemental NEPA analyses to consider, evaluate, and disclose the current levels of ORV use and damage;

(8) Retain jurisdiction of this action to ensure compliance with its decree;

(9) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

(10) Any injunctive relief requested by SUWA will not illegally infringe upon perfected R.S. 2477 rights-of-way that meet the standard set out by this Court in Southern Utah Wilderness Alliance v. BLM, 147 F. Supp.2d 1130 (D. Utah 2001), or that federal courts have recognized pursuant

to the Quiet Title Act. In addition, any injunctive relief requested will not seek to restrict access to Utah School and Institutional Trust Lands in contravention of the standards recognized in State of Utah v. Andrus, 486 F. Supp. (D. Utah 1979).

Respectfully submitted this 23rd day of July, 2003.

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Attorneys for Plaintiffs
Southern Utah Wilderness Alliance et al

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF UTAH

CENTRAL DIVISION

SOUTHERN UTAH
WILDERNESS
ALLIANCE et al.,

Plaintiffs, ORDER

vs. Case No. 2:99CV852K

BRUCE BABBITT et al.,

Defendants,

and

UTAH SHARED ACCESS
ALLIANCE et al.,

Defendant-Intervenors,

and

SAN JUAN COUNTY, UTAH et al.,

Defendant-Intervenors.

After a six-day evidentiary hearing on Plaintiffs' motions for a temporary restraining order and for a preliminary injunction, and after a subsequent hearing on Defendant-Intervenors Utah Shared Access Alliance et al.'s Motion to Dismiss, which pertained to the claims that were the subject of the preliminary injunction hearing, this court, on December 22, 2000, issued a Memorandum Decision and Order (the December 22 Order"). The December 22 Order, among other things, dismissed with prejudice Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief to the extent they pertain to the wilderness study areas ("WSAs") and the § 202 Areas addressed during the preliminary injunction hearing. Consequently, the court also denied as moot Plaintiffs' Motion for a Preliminary Injunction.

The court finds that there is no just reason for delay and expressly directs the entry of judgmdent on these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)").

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court is directed, pursuant to Rule 54(b), to enter judgment in favor of Defendants and Defendant-Intervenors on Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief, to the extent these claims pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing.

DATED this 9th day of February, 2001.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

HAND DELIVERED

September 14, 1999

Tom Fry
Deputy Director - Bureau of Land Management
1849 C. Street NW
Washington. D.C. 20240

Dear Directory Fry:

The Southern Utah Wilderness Alliance is pleased to welcome you to Utah for State Director Wisely's swearing in ceremony. We are looking forward to working with Director Wisely on a range of issues, including the § 202 wilderness inventory EIS and off-road vehicle management.

As you may know, ORV use and abuse is a pressing issue in Utah, and SUWA is gravely concerned that their serious, and indeed permanent impacts, are destroying Utah BLM lands. To that effect, I have included a handful of photographs taken over the Labor Day weekend near Factory Butte, an internationally recognized landmark, and an area recognized by BLM in 1999 as having wilderness characteristics. I have also attached a copy of the 1988 Henry Mountain Resource Area Off-Road Vehicle Implementation Plan, which specifically identifies the area around Factory Butte as a "special monitoring area," citing concerns of ORV caused damage.

BLM has never conducted this monitoring, and, as the photos enclosed illustrate, unrestricted ORV use is having dramatic impacts. Without such a monitoring

program, BLM has no concept whether ORV impacts are being "minimized" as mandated by Presidential Executive Order and BLM's own regulations.

This is only one example of an ORV problem plaguing Utah BLM statewide. We hope BLM recognizes the severity of this problem, and look forward to it taking the long-overdue steps necessary to curb ORV abuse.

Sincerely,

Stephen Bloch
Staff Attorney

Attachments

October 4, 1999

Dick Manus
Bureau of Land Management - Price Field Office
125 South 600 West
P.O. Box 7004
Price, Utah 84501

Dear Dick:

I wanted to thank you for taking the time to briefly meet with me and talk about the continuing off-road vehicle ("ORV") problem in the San Rafael Swell. SUWA is gravely concerned that abusive ORV use and subsequent impacts are destroying the wilderness qualities of wilderness study areas (WSAs) within the Swell. As I stated, it is firmly SUWA's position, and indeed the BLM's own regulations mandate, that WSAs must be closed to ORV use when they are suffering "impairment." As you well know, 43 C.F.R. § 8341.2 directs BLM managers to immediately close areas suffering "considerable adverse effects" from ORV use and abuse. That section further provides that areas must remain closed until "the adverse effects have been eliminated and measures implemented to prevent recurrence."

In Information Bulletin 99-181, issued on July 13, 1999, from Acting Director Tom Fry to all field officials, the BLM's clear position of not permitting WSA impairment was reiterated. (See attached and excerpted below)

> "It is the BLM's policy that cross-country vehicle use in the WSAs does cause the impairment if wilderness suitability. The BLM policy establishing what is necessary to prevent such impairment is set forth in BLM Manual Handbook H-8550-1, Interim

> Management Policy and Guidelines for Lands Under Wilderness Review. In chapter 1, Paragraph 2.B.a., nonimpairing use is "... a temporary use that does not create surface disturbance ..." Uses that cause surface disturbance are, therefore, impairing uses. In this same chapter in Paragraph 3, under the heading Surface Disturbance, it states "Cross-country vehicle use off boundary roads and existing ways is surface disturbance because the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation."

(Emphasis added).

As you acknowledged on Friday, your staff has prepared a report and summary of WSA impairments throughout the San Rafael Swell; a report that documents rampant ORV abuse and impairment. Because this report documents existing and ongoing impairment, it is incumbent upon you to immediately close the areas identified as suffering such abuse until such time that these threats are eliminated. SUWA strongly disagrees that there are any extraneous factors that would militate against immediately closing areas with identified resource abuses. Furthermore, any resource impairment rises to a level that demands such closure; there simply is no grey areas where impairment does not demand firm and immediate action. To this end, I have enclosed reprinted photographs of ORV caused impairment in Sid's Mountain WSA, taken the week of September 20, for your review and consideration. As these pictures illustrate, and as is true throughout the Swell, ORVs are leaving identified "ways" and causing widespread, permanent resource impairment. Indeed, ORVs do not remain on identified travel routes, but instead drive cross-country across some of Utah's most scenic and fragile lands.

I know ORV abuse is a high priority for your Field Office and expect that you will review BLM's own regulations and guidelines and quickly take the necessary steps to protect these resources; resources that we can all agree demand our utmost energy to preserve and protect for future generations. I look forward to hearing from you how the Price office will be addressing these concerns.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Sally Wisely, State Director
Tom Fry, Acting Director

August 19, 1999

Sally Wisely -State Director
Bureau of Land Management
324 S. State St. Suite 301
P.O. Box 45155
Salt Lake City, Utah 84145-0155

Dear Sally,

I wanted to thank you again for taking the time to sit down with Heidi and I last month. It was good to meet, and we're both looking forward to working with you in the future. Following up on our discussion of off-road vehicles impairing wilderness suitability in existing WSAs, I wanted to share these photos taken in May and August of Canaan Mtn. and Parunuweap WSAs. Photos number 1-3 are all taken from the border of Canaan Mtn. WSA, in an area that is only accessible by the Elephant Butte/Goat Springs Road, which provides ORVs access to both WSAs (see the accompanying 7.5 minute map - this area is circled in orange). As you can plainly tell, these pictures show a BLM constructed barrier, that was intended to prevent ORV access to Broad Hollow (Canaan Mtn. WSA), completely dislodged and destroyed. I have also included a letter from BLM wilderness ranger Mike Salamacha from March 1999, describing both the barrier and the destruction he has witnessed over the years to this area.

Additionally, photos number 4-5 are taken many miles inside the Parunuweap WSA. Notably, these pictures are not taken from an existing road, as you might expect from the apparent high use, but rather on an entirely illegal user trail. (See the accompanying 1:100,000 map - this area is circled in orange). ORV users drive the Poverty Flat Road, which is senselessly cherry-stemmed many miles inside the WSA and creates an indefensible boundary for

BLM, and simply continue on a now well-traveled route. The St. George and Kanab offices are well aware of this route, but because this area is between three BLM office jurisdictions (Cedar City, St. George, and Kanab), BLM has been either unwilling or unable to protect this spectacular resource. Further, about a mile up the "road" from the end of the cherry stem, a natural ledge presents an excellent opportunity for BLM to place a barrier and prevent further ORV abuse. These two examples are representative of statewide ORV caused wilderness impairments occurring right now.

Not to dwell entirely on the negative, we are encouraged by the Cedar City Office's proposed placement of rock barriers in Spring Creek Canyon WSA to prevent further ORV abuse. This is precisely the step BLM needs to take on a statewide basis -- a step that is both long overdue and sorely needed. Of course, vigilant enforcement of this closure is absolutely necessary to its effectiveness, and we have every confidence that law enforcement will take whatever steps necessary to ensure this happens.

Finally, as noted in BLM Information Bulletin 99-181 (July 13, 1999), "cross-country vehicle use in the WSAs does cause the impairment of wilderness suitability . . . [such use] is disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soil and trample vegetation." Though current BLM IMP for Lands Under Wilderness Review does allow vehicle travel in WSAs on existing routes, such travel is only permissible if it does not cause impairment of the wilderness resource. It is simply fictitious for BLM to believe that such impairment is not occurring on and off the numerous "existing" routes within WSAs. Indeed, off-route travel is frequently the rule, and not the exception in Utah WSAs.

I would be happy to speak further with you about this and other ORV issues after you have had a chance to review the photos and perhaps to speak with Field Office managers and staff. Thank you again for your time.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Keith Aller, Special Agent in Charge

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, et al.,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit Corporation, et al.,

Defendants-Intervenors

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Case No. 2:99CV852K

Request for Admission 35: Impairment has been, and continues to be caused by ORVs within Utah BLM managed wilderness study areas.

Response: The defendants admit that impairment has been caused by ORVs within some Utah wilderness study areas but deny that impairment has been caused in all Utah wilderness study areas. Specifically, there is no known impairment of the Wah Wah WSA, the La Verkin Creek Canyon, the Watchman, Taylor Creek, Goose Creek, Bear Trap, the Joshua Tree Instant Study Area, the Dirty Devil WSA, most of the Mount Ellen-Blue Hills WSA, a portion of the Mount Hilliers WSA, most of the Little Rockies WSA, the Bridger Jack WSA, the Mancos Mesa, and the Daniels Canyon WSA.

(3)

No. 02-1703

Supreme Court, U.S.
FILED
OCT 6 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

	Page
Introduction	1
Reasons for Granting the Petition	1
A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below	1
B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits	5
C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review	6
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) 8

Assoc. of Civilian Technicians v. Federal Labor Relations Authority, 283 F.3d 339 (D.C. Cir. 2002) 5

Butz v. Economou, 438 U.S. 478 (1978) 2

California Brewers Assoc. v. Bryant, 444 U.S. 598 (1980) 2

Center for Biological Diversity v. Veneman, 335 F.3d 849 (9th Cir. 2003) 7

Ecology Center v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999) 5, 8

Florida Power & Light Co v. Lorion, 470 U.S. 729 (1985) 4

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) 8

Forsyth v. Hammond, 166 U.S. 506 (1897) 1, 2

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 2

Heckler v. Chaney, 470 U.S. 821 (1985) 8

Hells Canyon Alliance v. U.S. Forest Service, 227 F.3d 1170 (9th Cir. 2000) 4

Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985) 7, 8

Land v. Dollar, 330 U.S. 731 (1947) 2

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 2

TABLE OF AUTHORITIES – Continued

Page

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 3, 5, 9

Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950) 7

Montana Wilderness Assoc. v. U.S. Forest Service, 314 F.3d 1146 (9th Cir. 2003) 4, 5, 7, 9

NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 3, 7

Ohio Forestry v. Sierra Club, 523 U.S. 726 (1998) 9

ONRC Action v. BLM, 150 F.3d 1132 (9th Cir. 1998) 5, 6

Public Citizen Health Research Group v. Commissioner, Food & Drug Admin., 740 F.2d 21 (D.C. Cir. 1984) 8

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 5

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 2

United States v. General Motors Corp., 323 U.S. 373 (1944) 2

FEDERAL REGULATIONS

43 C.F.R. part 8340 6

INTRODUCTION

This case asks the Court to consider the manner in which federal courts may review agency "inaction" under the Administrative Procedure Act (the "APA"). The Court should grant the petition for certiorari to consider whether one may bypass "traditional" APA section 706(2) review of final agency action by framing theirs as an APA section 706(1) claim targeting agency "inaction." This case presents important jurisdictional issues that will not benefit from further activity in the lower courts. Circuit Courts split on the jurisdictional analysis, and the new approach created by the Tenth Circuit's decision here will dramatically expand and alter traditional APA jurisdictional review, with broad ramifications for executive branch administrative agencies, federal courts, and interested members of the public. This Court should hear this case to define and clarify the proper boundaries of APA section 706(1) review.

REASONS FOR GRANTING THE PETITION

A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below.

Nothing about the procedural context of this case diminishes the need for this Court to offer guidance on the fundamental APA jurisdictional issues presented. Respondents argue this Court "has a long tradition" of refusing to hear cases "whose claims have not each been fully resolved by the lower courts." Br. in Op. 10. Respondents characterize the decision below as an interlocutory decision and suggest that further proceedings "may moot or narrow petitioners' concerns in this case." *Id.* at 11. These arguments are not correct.

This Court has often heard cases which were not fully or finally resolved in the lower courts. Respondents' concerns were considered and rejected in *Forsyth v.*

Hammond, 166 U.S. 506 (1897), in which Justice Brewer noted that the petition identified several conflicts, and concluded "although no final decree has been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment." *Id.* at 515. The Court further noted the power of certiorari "extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency. . . ." *Id.* at 514. Later decisions of the Court clarify that review of a nonfinal judgment is appropriate when the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944); see also *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-154 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 743 n.3 (1947). Several cases, including *Land* and *Larson*, involved procedural contexts strikingly similar to this case, in which trial court dismissals were reversed in the court of appeals and the case remanded for trial.

Additionally, the Court has often, without specifically mentioning the "fundamental to further conduct" rationale, granted certiorari to consider important issues presented through cases involving circuit court reversals of district court dismissals. *California Brewers Assoc. v. Bryant*, 444 U.S. 598, 601 (1980) (petition granted "to consider the important question presented under Title VII of the Civil Rights Act of 1964"); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 536 (1978) (petition granted "[t]o resolve the conflicting interpretations of [Sherman Act] adopted by several Courts of Appeals"); *Butz v. Economou*, 438 U.S. 478, 480-481 (1978) (certiorari granted in case involving governmental immunity "[b]ecause of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government . . ."). The Court certainly has discretion to grant the petition(s) and review the Tenth Circuit's decision here.

This case fits well within the cases outlined above and there are numerous reasons why the Court should grant certiorari here. The rights at issue are certainly public rights, framed in the geographical context of the Nation's diverse and voluminous public lands. The APA principles at issue are of even broader importance, because the APA provides the jurisdictional starting point for nearly all judicial review of agency action, since "there is hardly ever any need for Congress" to create "a private right of action against the *federal* government. . . ." *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 152 (1st Cir. 1987) (italics in original); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (explaining that where there is "no specific authorization in the substantive statute" review proceeds under the APA). As pointed out by Petitioners here and in Nos. 03-101, 03-109, and 03-123, there is substantial confusion, if not direct conflict, between varied circuit and district courts over the correct treatment of the APA section 706(1) cause of action.

There is little question that resolution of this issue is "fundamental to further conduct of the case." Respondents contend that this case below has involved only "a subset" of their claims and that a broad range of "plausible outcomes" below militate against review in this case. Br. in Op. 12. None of these concerns should preclude review here; Respondents only propose to apply the same jurisdictional template to different permutations of the 23 million acres of BLM-managed lands in Utah targeted by their complaint. Br. in Op. App. 33, ¶ 12. None of these possible variations[1] will eliminate the need for guidance from this

[1] Respondents complain that their claims were dismissed "at such an early stage" by the district court. Br. in Op. 11. In reality, the district court allowed Respondents six days of evidentiary hearings and a seventh day of oral argument in prosecuting the motions in question. See Pet. 9. The procedures adopted by the district court were far more elaborate than those employed in a typical public lands "record review"

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Court on the proper interpretation of APA section 706(1) jurisdiction.

Finally, it would disserve judicial and administrative economy for this Court to delay review. As explained in the Petitition(s) here and in No. 03-123, the Tenth Circuit's decision and the Ninth Circuit's decision in *Montana Wilderness Assoc. v. U.S. Forest Service*, 314 F.3d 1146 (9th Cir. 2003), are already being applied to allow expanded review of ongoing agency activity under APA section 706(1). Respondents are not presented with a "jurisdictional vacuum" in which BLM's numerous decisions affecting vehicle access are immune from review; they are hoping to utilize section 706(1) to leverage more desirable agency activity through the long-running and ill-defined judicial review allowed by the Tenth Circuit's decision. If allowed to proceed on its present course, this case could last several more years before the district and circuit courts render the "full" and "final" resolution that Respondents would require as a prerequisite to certiorari. Such development will not alter the need for guidance from this Court on the nature of section 706(1) review. Rather than forcing the parties to endure multiple presentations of the identical issues below, it far better serves the interests of all involved to grant review here to better define the nature of judicial review of agency inaction.

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case under the APA. See, e.g., *Florida Power & Light Co v. Lorion*, 470 U.S. 729, 743-744 (1985) (explaining focal point for judicial review is administrative record relied upon by agency); *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1175 (9th Cir. 2000) (example of APA section 706(2) case resolved on cross-motions for summary judgment drawing from the "voluminous record").

B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits.

The Tenth Circuit's decision cannot be squared with prior decisions of this Court and other Circuit Courts of Appeals. Respondents' attempts to distinguish *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) are unpersuasive. Respondents argue that these cases involved "sweeping programmatic claims" as opposed to the "site-specific legal violations" targeted by Respondents. Br. in Op. 15. However, Respondents ignore the basic unifying factors: each case focuses on broad geographic areas and broad legal duties, *not* on any discrete *final agency action* applying the legal duty to the broad geographic area targeted in the complaint. *Lujan* counsels, at least where the agency has acted on the duty at issue, that a focus on "a specific 'final agency action' [that] has an actual or immediately threatened effect . . ." is the "traditional . . . and normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

Respondents largely ignore the Ninth Circuit decisions in *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998) and *Ecology Center v. U.S. Forest Service*, 192 F.3d 922 (9th Cir. 1999). Respondents erroneously suggest the Ninth Circuit's recent decision in *Montana Wilderness* rejected *Ecology Center's* "genuine failure to act" rule. Br. in Op. 16 n.8. *Montana Wilderness'* cursory discussion certainly does not explicitly overrule *Ecology Center*. *Montana Wilderness* offers no meaningful guidance between a challenge to the sufficiency of action taken "dressed up" as a failure to act and a proper challenge to "partial" action on a mandatory legal duty. The D.C. Circuit Court of Appeals employed the same reasoning as *Ecology Center* to affirm dismissal of section 706(1) challenges reflecting "nothing more than substantive disagreement with the agency's legal rulings." *Assoc. of Civilian Technicians v. Federal Labor Relations Authority*,

283 F.3d 339, 344 (D.C. Cir. 2002). Finally, Respondents entirely omit any reference to *ONRC Action*, in which the Ninth Circuit affirmed a district court dismissal of a section 706(1) claim based on a "nondegradation" duty structurally identical to the "nonimpairment" duty in this case, finding that the duty in question was not the type of "clear statutory duty" subject to a proper section 706(1) claim. *ONRC Action*, 150 F.3d at 1139 and n.7.

Respondents finally argue that their case is distinguishable because they will be deprived of any opportunity to challenge "BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action." Br. in Op. 17. This statement is incorrect. *All* vehicle access on Utah BLM lands flows from *some* agency decision. Contrary to Respondents' implication, there is no general presumption allowing cross-country, or any, vehicular access. BLM authorizes and restricts vehicle access through a public planning process. 43 C.F.R. part 8340. Respondents may now be dissatisfied with their failure to challenge *past* decisions to authorize use, and are sufficiently experienced to understand the difficulty of succeeding in a section 706(2) "arbitrary and capricious" challenge to the agency's chosen balance in decisions such as the San Rafael Route Designation Plan or the Coral Pink Sand Dunes Management Plan. Rather than identifying the absence of an opportunity for judicial review of BLM's vehicle access decisions, Respondents hope through section 706(1) to create a new, broader and easier method of review.

C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review.

Respondents' view, now endorsed by the Tenth Circuit, would allow creative private interests to subject federal land management agencies to perpetual litigation challenging the agencies' failures to take "complete" action on broad and discretion-laden duties. Such is not the result of "unexceptional" application of textbook APA principles, but

would represent a profound "paradigm shift" in the relationship between the judiciary and executive branch agencies.

Respondents cite several decisions in arguing that theirs is an "unexceptional" challenge comparable to "the many analogous cases in which courts have considered inaction claims under the APA." Br. in Op. 22. The citations to *Montana Wilderness* and *Center for Biological Diversity v. Veneman*, 335 F.3d 849 (9th Cir. 2003) provide little support, for these recent decisions rely for support on the decision under review or are themselves the subject of petitions for certiorari. Careful analysis of the remaining decisions reveals they are distinguishable and only amplify the confusion surrounding section 706(1) and the resulting need for guidance from this Court. First on this list is *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987). *NAACP* must be considered in light of the unique statutory language at issue, in which Congress specifically directed the Department of Housing and Urban Development must act "in a manner affirmatively to further" the policies of the Fair Housing Act. *Id.* at 151. More importantly, the First Circuit's decision seemingly turns on the analogy to cases finding section 706(1) can be used to compel an official " 'to exercise his discretion where he has obviously failed or refused to do so.' " *Id.* at 160 (quoting *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950)). Thus, *NAACP* only reaffirms the principle that section 706(1) can be used to challenge a total failure to act, but offers no guidance on the central issue of this case, namely, whether allegations that an agency has only *partially* discharged a statutory duty can constitute a viable section 706(1) claim.

This distinction covers the bulk of Respondents' "many analogous cases." For instance, *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985) is clearly a "total inaction" instead of a "partial inaction" case, for the court there compared the situation at issue to "the Secretary's failure to implement a program entirely, not simply his failure to

grant aid in a particular case . . ." and "regard[ed] this fact as the essential point distinguishing . . . *Heckler v. Chaney*, 470 U.S. 821 (1985). . . ." *Id.* at 350 and n.2. Similarly, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) involved allegations that the agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.* at 1162. Such is also the case with *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1181 (10th Cir. 1999), in which the Secretary of Interior admitted the agency failed to designate *any* critical habitat by the deadline established by the Endangered Species Act. Finally, Respondents' cited section of *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) only endorses judicial intervention via section 706(1) when an agency has utterly abdicated a statutory duty to act or is "lag[ging] unreasonably" in reaching *any* decision. *Id.* at 32. *Public Citizen* involved a challenge to FDA's failure to reach any decision on a petition alleging aspirin products must carry a warning about Reye's Syndrome. Despite the agency's failure to take timely action, the D.C. Circuit Court of Appeals actually held that "respect for the integrity of the administrative process . . . precludes judicial review, prior to a definitive agency resolution" of the petition. *Id.* at 35. In short, none of these cases add anything beyond the rule summarized in *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999), requiring a proper section 706(1) claim to target a "genuine failure to act."

There is no "genuine failure to act" in this case. With regard to their "land use plan commitment" claims Respondents admit that the "delayed" or "withheld" actions *have been performed.* Br. in Op. 6 n.2; Br. in Op. 18 n.11. On these claims, there is no agency action to "compel" and dismissal should be, and was, appropriate just as it was for the monitoring-focused claims of *Ecology Center*.

BLM similarly has long acted, and continues acting, on Respondents' "nonimpairment" claims. Respondents

candidly admit "that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit. . . ." Br. in Op. 17 n.9 (italics in original); see also, Pet. Br. 18-19 (discussing BLM actions to restrict vehicle access in areas at issue). Respondents specifically mention the existence of the relatively recent San Rafael Route Designation Plan which "determine[s] which routes will be closed and which will be open . . .," acknowledge that Plan closes 468 miles of routes while designating 677 miles as open, and note the decision is "final agency action" subject to "arbitrary and capricious" review under APA section 706(2). Br. in Op. 19 and n.12. Rather than using section 706(1) to create unprecedented and ongoing judicial oversight over BLM's management efforts Respondents should pursue any continuing disagreements with BLM through the "traditional, and . . . normal, mode of operation of the courts" by challenging final agency action. *Lujan*, 497 U.S. at 894; *Ohio Forestry v. Sierra Club*, 523 U.S. 726, 735 (1998). None of the cases cited by Respondents allow one to use APA section 706(1) to challenge active and ongoing agency efforts toward compliance with broad, multiple-use statutory duties.

If Respondents are correct any section 706(1) claim survives jurisdictional scrutiny if framed as a challenge to "partial" compliance with a statutory duty. Until the Tenth Circuit's decision here and the Ninth Circuit's decision in *Montana Wilderness* no court has adopted Respondents' interpretation of section 706(1). At most, Respondents' cited authority demonstrates the confusion in the lower courts and provides fodder for presenting the merits of this case to the Court. This Court should grant certiorari to consider the important and timely questions concerning the proper nature of APA section 706(1) review.

CONCLUSION

For the reasons stated above, and in the petitions for writ of certiorari in this matter and in No. 03-101, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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